



DIEU ET MON DROIT

Sold by George

Dawes



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# A View OF THE ADMIRAL Jurisdiction.

WHEREIN

The most Material Points concerning that JURISDICTION are fairly and submissively Discussed.

AS ALSO

Divers of the Laws, Customs, Rights and Priviledges of the High Admiralty of England, by Ancient Records, and other Arguments of Law Asserted.

WHEREUNTO

Is added by way of APPENDIX, an Extract of the Ancient LAWS of OLERON.

For the better Regulation and Government of Merchants, Owners of Ships and Part-Owners, Masters of Ships and Common Mariners in all Maritime Affairs.

WITH

A Catalogue of all the Lords High Admirals that have been in this Kingdom since King John's time, to the Reign of His now Most Gracious Majesty, K. JAMES II.

By JOHN GODOLPHIN, LL. D.

The Second Edition Corrected and Amended.

LONDON: Printed for and Sold by George Dawes, in Chancery-Lane, against Lincolns-Inn-Gate, 1685.

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## To the Reader.

**H**E that Negotiates about *Maritime Affairs*, is under *Protection* without *Letters of safe Conduct*, as being within the *Sanctuary of Jus Gentium*; and the right Timing of a *Modest Address* oft times proves more successful than a *Confident Argument* out of season; There seems some probability, as if this *Treatise* obtrudes not upon the World, or thy Patience, like a *Traſt* born out of due time; nor as if it came like a *Physician* to his Patients Funeral; or as *Suetonius* relates touching the *Deputies of Troy*, sent to condole with *Tiberius* seven or eight Months after the death of his Sons: If this *Treatise* be out of season, others as well as

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my self are happily deceived ;  
in which case it will suffice to  
say with *Philip de Comines* , That  
*It is very hard for a man to be wise,*  
*that hath not been deceived.*

For the *Method*, it is as Regular  
as the *Arguments* would afford ;  
though not so exact as might  
have been, if the same Metal had  
been cast into another Mould ;  
yet not so rude and out of shape,  
as to suspect from the disproportion  
of the Body that the Soul  
is ill lodged, or like some *long-*  
*breath'd confused Discourses*, of late  
much in fashion, whereof it may  
be truly said as was once of the  
*Romans* two Ambassadors sent to  
one of their Provinces, whereof  
one wounded in the Head, the  
other lame in his feet, *Mittit Popu-*  
*lus Romanus Legationem, quæ nec caput*  
*Pedes habet* ; and which for their  
*prolixity*

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prolixity and immethodicality may justly expect the same answer that those of Lacedemon gave the Samnites, That they had forgotten the Beginning, understood not the Middle, and disliked the Conclusion.

The Subject-matter of this Treatise is not so much *de jure*, as *de jurisdictione Admiralitatis Ang'ie*, not so much touching the Law of the Admiralty or Sea-Laws, as now received and practised in the Navigable Parts of the World, as in reference to the Jurisdiction of that Law within this Kingdom of Great Brittain; So that it will on all hands be easily agreed, that the Argument of *Jurisdictionis* is *Questio admodum Subtilis*; and no wonder, if you consider, That that which is *de competentia Jurisdictionis & Jurisdictionis*, is *totius juris velut Obex & repagulum*; But,

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and zeal for the *Publick*, facilitates the highest difficulties. To leave the Laws *sub Incognito*, or Jurisdications *sub incerto*, are both of National ill consequence, subjecting the People either to *Transgression*, through *Ignorance*, or to *unnecessary Expences*, by multiplicity of *Law-Suits*. *Lux, Lex, & Veritas*, are almost *Synonymous*; if either of these suffer, though but a partial Eclipse, how great is the darkness thereof; If a Jurisdiction, without which the Law is but as a dead Letter, be uncertain, how great is that uncertainty? but the liquid and clear stating and ascertaining of Jurisdications to their proper and respective Boundaries, beyond which one may not pass to the invading of another, is one of the *primary Constitutions* of *Jus Gentium*.

This

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This *short View* of the *Admiral Jurisdiction* was in its *Origination* designed only to prevent a *Vacuum inter alia negotia*, and not to hazard the *Censure* of a *Superfluum inter aliorum otia*. And although a great part of this *Fabrick*, be laid on a *Foundation of Civil Law*, yet in regard it is an indispensable *Duty* which every man owes his *Native Countrey*, to keep, as much as may be, *sub incognito*, from *Strangers* and *Foreigners* abroad, what possibly may not be absolutely perfect (for there is no perfection under the Sun) *quoad modum procedendi* at home, *Sumus enim Surdi omnes in Linguis quas non intelligimus*; And in regard this *Treatise* must recite the very *Letter* of certain *Clauses* of several *Acts of Parliament*, *Transactions* of *State*, and *Book-Cases* of *Common*

A 4      *Law*;

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*Law* ; And in regard the Satisfaction of Merchants and Mariners was the *main motive* and *design* of emitting this to the Opinions of men ; For these reasons it could neither properly nor profitably speak the *Ideum* of that Law, which is no less adequate to the *Admiralty*, than currant over all the *Christian World*.

The *just Rights* and *Customs* of the *Jurisdiction* of the *Admiralty* of *England*, are here with submission asserted, and consequently therein many of the *Priviledges* of *Merchants* and *Mariners* ; and not only of those who have a Birth-right to *England's* Laws of the *Admiralty*, but also of all such, who negotiating with us, have a Right thereto by the *Jus Gentium*, and National Treaties. The Merchant is *Bonum Publicum*, and such  
is



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is that Nations Interest whose Merchants do flourish, that to gratifie them with all *possible Immunities* and *due Encouragement* is now become the common Policy of all such *Kingdoms* and *States*, as reap more Treasure from their *Ports* than *Pastures*. It was most true, what *Seneca* once said of them, *Mercator urbibus prodest, Medicus aegrotis*; *De Benefic. 12.* without whom a Communality or Civil Society of Men can scarce plentifully or honourably subsist. It was a saying with *Baldus*, that famous Civilian, *That the World could not live without Merchants*. Whence it may be rationally inferred, That that Nation is nigh drowning, whose Merchants are under Water; their Function being to import *Necessaries*, and to export *Surpluses*; If

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If therefore such *Marine Controversies* as arise between Merchant and Merchant, or between Merchant and Mariner, should be removed from the Cognizance of the *Admiralty* (whereof there is now no fear) *ad aliud examen*, it might prove no fallible *Index*, but that our *Trade* and *Commerce* in too sad a measure might also in some short time after be exported *ad aliam Regionem*. Here therefore is the Merchant and the Mariner insisting not for any thing more than what is according to the known Laws of the Land, and the ancient established Sea Laws of *England*, with the Customs thereof, so far as they contradict not the Laws and Statutes of this Realm, It will not be denied, but That *Jurisdic-tio originaliter radicata est in Principe,*

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*cipe; & ab eo descendunt*  
*Judices sicut Rivuli a*  
*Fonte suo.* The deci-

*Angel. in Rub.*  
*D. de Jurisdic.*  
*om. Judic.*

sion of the Rights of Jurisdic-  
tions resides not in any persons  
of a private capacity, but in that  
Power that creates and consti-  
tutes Jurisdications; that is, the  
Prince or chief Magistrate, as  
the Supream Source or Fountain  
of all Humane Laws and Judi-  
catories.

Reader, It seems something  
difficult to determine, whether  
the *Sophistication of Truths*, or the  
*Fucus of Errors* hath of late years  
been the more *Epidemical* cheat  
in Print, it being sufficiently  
notorious how that adulterous  
Generation went a whoring af-  
ter the Press, and what a noisom  
Spawn of illegitimate Brats were  
then generated of the froth of  
the

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the Brain, not less numerous than spurious, that neither their male-content Parents, nor Religion, Law, Reason, nor Charity are able to maintain. And although this *Treatise* be of a more generous extraction, yet it is very far from complementing it self with the least vain hopes of exemption from those Censures which are common to all men. It is worth an *Asterisk* to observe how infeasable it hath been in all Ages for the most Innocent to escape this Correction; *Aristotle*, that Prince of *Peripateticks*, was accused of being too obstruce and obscure, and in many things labours under *Galen's* reprehension; the Dialogues of Divine *Plato* are taxed for being too confused and immethodical; *Virgil* by some is counted but a shallow

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shallow and weak witted Poet,  
and by others charged as if he  
were wholly beholding to *Homer*  
for his Works; and *Homer* him-  
self is derided by *Horace*, as if  
he were too drowfie a Poet; *De-*  
*mosthenes* could not please *Marcus*  
*Tullius* in all thing; *Trogus*  
*Pompeius* doth accuse *Titus Livius*  
his Orations of Fiction and Fal-  
sities; *Seneca* was nick-named,  
and called *Lime* without *Sand*;  
*Pliny* is compared to a turbulent  
River that tastes of many things,  
but digests few. But to come  
home to the Worthies of the  
*Civilians* Profession; for even  
the most *Orthodox* Oracles of the  
*Civil Law* have not escaped such  
undue Reprehensions; As some  
have affirmed that *Accursius* had  
no depth of Judgment; Others  
reprove *Bartol* for the length of  
his

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his *Distinctions*, as if somewhat too *Monstrous* by having too many Members; On the other side, *Albertus* is blamed for too much Brevity; *Baldus* for inconstancy and instability of Judgment; *Alexander* for the perplexity of his Method; and both the *Raphaels* for their too much subtilty, in some things for their neglect of and carelessness in the more polite Literature, in other things for their non-citing and mis-alledging the *Doctors*; And in a word, those very Ancient and most Famous Lawyers, that by the profoundness of their Judgment and splendour of their Eloquence have so illustrated the dark and obscure places of the Civil Law, as that they have left the World just cause of Admiration, no hopes of Imita-

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Imitation, even these have not escaped the like mis-reprehensions, For in the Life of *Justinian*, *Perinus* (out of *Suidas*) hath a large Invective against *Tribonian*, that *Architect* of the *Pandects*; Besides, who more *Eloquent* than *Ulpian*? who more *Pithy* than *Paulus*? who more *Learned* than *Callistratus*? who more *Acute* than *Papinianus*? who more *Distinct*, and withal *Succinct* than *Scaevola*? who more *Free* and *Fluid* than *Caius*? who more *Profound* than *Africanus*? who more *Delightful* and *Satisfactory* than *Pomponius*? who more *Clear* and *Transparent* than *Celsus*? who more *Candid* and *Ingenious* than *Triphonus*? Yet all these in their *Respective* and *Incomparable* Works have met with the said undue *Reprehensions*. If this  
therefore

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therefore shall chance to meet  
with some waspish humours,  
we must consider the Climate ;  
Nor is it more than wants a  
President, or less than needs a  
charitable Construction ; which  
is the worst Revenge can pos-  
sibly be executed by such as  
chuse rather to *suffer* than *of-  
fend*.

J. G.

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THE



THE  
**Introduction,**  
 OR,  
**PREFACE**  
 To the Ensuing  
**Treatise:**

CONTAINING

**A Short View of the Civil**  
*Law*, relating to Merchants, Owners of Ships, Part-Owners, Masters of Ships and Common Mariners; Together with, Freight, Piracy, Ejectment, Contribution, Wrecks, and Reprizall.

**T**HE *Systeme of Jurisdictions* is as the *Law* it self, above the Notions of any Private Conception; he is some thing more then of a singular Invention, that thinks he can arraign the Verdict of all Ages, *Nihil dici queat quod non prius dictum fuit*; And he is more then of an audacious spirit, that dares invade the Laws Prerogative, *Nihil proferri debet,*  
 (a) *quod*

Terent. in  
 Prolog. Eneu-  
 chi.

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*quod non prius Constitutum fuit.* Hence it is that he that writes of that Subject *without Book*, that is, that vents his own Notions, or sails by the weather-cock of his own Brain, not only confiscates the ill-stowed Cargo of his Intellect, but also renders himself no less arrogant and presumptuous in the tacite apprehensions of the Prudent, then shallow and ridiculous to the most rural Capacities. It is therefore nothing dishonourable for Treatises of this Nature to merit the Application of that Liberty which *Crysippus* took, of whom it is said, That he borrowed so freely from *Authors*, that if his name were but expunged or obliterated out of the Title Page, there would nothing remain that could properly be called his own; It is neither heretical nor disingenious to accomodate old Truths to new Designs; so it be done aptly and honestly & *sine animo furandi*: for there is that Credit by way of debt due to the *Authors*, that it is no less then Theft to conceal them; whereas one half of the debt is paid; if you duly quote them; yea, they become your Debtors, if by the ingenuity of your Husbandry you raise their Credit according to the improved value; But he that conceals the Patrons of his Assertions, is ashamed of his own Craft, robs the Dead, and cheats the Living. He that writes Politicks without prefixing his Principles comes short of his Duty; But he that writes Law without quoting his Authority, perfumes beyond his Line; he that blushes  
to

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to be ingenious, is ashamed of his own modesty; *Plato* borrowed many things from *Pythagoras*, *Aristotle* from *Plato*, and *Theophrastes* from *Aristotle*; This Treatise hath borrowed nothing but what he intends to pay, here's the acknowledgment of the debt, full satisfaction with interest may be expected elsewhere, sufficient Caution being given in the subsequent *Elenchus* of the Creditours.

As Reason is the soul of the Law, so Jurisdictions may be styled the faculties of that soul, being reduced to act or exercise as they are accommodated to this or that object; Consequently therefore to confound Jurisdictions, is to obliquitate the Rule of all Humane actions, specially if any thing less than *Bonum Publicum*, under a vizior be the Authour of that confusion. *Mine* and *Thine* divide the world betwixt them; in Private transactions they are unhappy Monosyllables, but in Publick affairs they may be of most dangerous Consequence; insomuch that *Seneca* said, The world would be quiet were it not for those two ambitious Pronouns. (a) This *Meum & Tuum* is here understood Collective, for *Jurisdictio* being of Publick right is not competible with any Private interest exclusive to common good, (b) that being beside the design of *Jus Gentium*, whereby Jurisdictions were Originally constituted. (c) The flux and reflux of Jurisdictions are from and to the Prince as Rivers from and to the Ocean, wherein Transacti-

(a) *Senec. lib. de Morib.*

(b) *L. 1. l. est receptum. ff. de Jurisd. om.*

*Jud. & l. privatorum. Cod. de Jurisd.*

(c) *Narta. Conf. 639. nu. 2. & 99. &*

*Joach. Sceph. de Jurisd. c. 1. nu. 19.*

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ons of the greatest weight and burden are Navigable ; And therefore to obstruct the Current of Justice in this or that Channel may force open the Sluces of the Law to a Catalysme of Injustice, and dissolve the Ligaments of the best joynted Body Politick in the whole world ; And yet if the Streams of one Jurisdiction, running too rapid, overflow its banks to the inundation of another, it's most just and safe, seasonably to reduce, them to their proper Channels. Were it

(d) Bald. Conf.  
333. lib. 1.

true that Bald. says, (d) *Jurisdictiones penes Principes residere quasi Scabellum*, the Clashing of Jurisdictions might be an offence only to the Footstool of Majesty ; but if *Jurisdiction ejus ossibus inhaeret*, as *Tapia* and others assert, (e) then it may be of an higher nature.

(e) Car. Tapin  
ff. de Count.  
Prin. cap. 4.  
nu. 14. & N  
rant. Distinct.  
nu. 5.

Where divers persons are concredited with Juridical Trust or Authority, there the Jurisdiction is either *Seperate*, or *Concurrent*, or in *Common*. A *Seperate* Jurisdiction may appertain to a certain number of persons *private* or *exclusive* to all others, whereby they are externally quallified to take Cognizance either of other Persons, (f) or of other Causes, (g) or of other Quantities, (h) or of other Places, (i) then what other Judges are Juridically quallified for. A *Concurrent* Jurisdiction is that which appertaineth to many *Cumulative*, as when the same Cases are equally subjected to the Cognizance of many Judges : yet so that each of them, whether one or more, by him-  
self

(f) L. 6. Cod.  
de Jurisd.  
(g) Lult Cod.  
ind.  
(h) L. 11. cum  
sq. de Jurisd.  
(i) Alex. tot.  
rit. de Ofic.  
Juridic.

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self or themselves, may in *solid m* hear and determine the Case, and he or they only may take Cognizance thereof to whom address by the Complainant is first made, and before whom the Suit is first Commenced, for in such Cases prevention takes place; and in all Competent Jurisdictions wherever the Action is first Commenced, there Judgment ought to be given in the Case. (1) Thus the Imperial Chamber by an Ordinance there made hath Concurrent Jurisdiction with the *Emperêur* himself, (m) save in matters relating to the Fee or Inheritance of the Imperial Crown. A Jurisdiction in common appertaineth to many, and that *cumulative*, as to all of them, so to all of them together, and *complexive*; insomuch that one of them may not proceed without the other; the Law obliging all of them to be present together in Judgment. (n) But whatever Jurisdictions there are in a Nation, of how many kinds, degrees, orders, or subordinations soever, This is a sure Rule and without exception, *Jurisdictiones non sunt confundenda*; (o) The *Bonum Publicum* is more Rationally stated, and more concerned in the equall administration of Justice, then to admit the least Confusion in that which is the only Expedient to prevent Confusion; for Justice (whose office it is not only to do that which is equal, but also to remove that which is unequal) is never illustrable through any Mediums that hath the least tincture of Injustice; and although

L. penult. ff. de petit. h. r. redit. & l. i. Cod. ubi de Crim. agi oport.

(1) L. 3. ubi corruptum. ff. de Judic. (m) Gail. l. i. obs. 29. nu. 3. & obs. 42. nu. 3.

(n) L. tunc autem. 37. ff. de re Judic.

(o) L. nemo. Cod. de Jurisd. om. Jud.

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for its material Object, it ever hath some one External action or other, as suppose Equality between Payment and Debt, yet for its Formal Object it ever hath Honesty, and Conformity unto, at least an adequate Consistency with natural reason, comprised in that external Act.

Of all Jurisdictions, That of the Admiralty or Sea-Affairs hath been the least beholding to the Auxiliaries of the Press in defence of its Ancient Rights and Priviledges against such as would without offence impair the same; The reason probably may be either from the paucity of such, as are more specially therein concerned, in respect of that numerous Host or Retinue, that in fealty to the other Jurisdictions are most prompt Notaries on all occasions; or rather in that it is of that excellent use in all Maritime Dominions, that the Friends thereof are well assured, its worth would be better valued, if the want thereof were more smartly felt. The Ensuing Treatise is to assert the Rights thereof in part, the design of most highest Ambition being only rather to excite others by this hint to supply the defects hereof by a more full and clear illustration of the Rights and Priviledges of so Ancient and Necessary a Jurisdiction, then to convince any by Arguments less perswasive then that Interest whereon some mens Prejudice may be founded. Though Merchants and Mariners *qua tales* be not such able Lawyers as to know *how* their Maritime Cases

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Cases should be determined according to the exact Rule of Law, yet they are such able Supports to any Nation or Kingdom, that they are not to be left *sub incerto*, where or in what tribunal to find that Rule under such a quality of Juridical Competency, as not to run hazards by Land as well as by Sea; yet this under the Notion of a Maritime Cause, when possibly it is of another Element, may not be strain'd in favour of one Jurisdiction in derogation of another; nor under the notion of Merchants, when possibly they are at best but *quasi Mercatores*; For not every one that buyes and sells, is thence presently to be denominated a Merchant, but he only who in the way of Trade and Negotiation deals in Moveables for gain or profit, upon design of disposing thereof in the way of Commerce either by Importation, Exportation, or otherwise, in the way of Emption, Vendition, Barter, Permutation or Exchange. (p) So that he is not properly said to be a Merchant, who once and no more doth buy Commodities that he may sell the same, for it is not one Act that doth denominate a Merchant, (q) but a certain Assiduity or frequent Negotiation in the Mystery of Merchandizing, unless he be matriculated or entred as such in the Society or Corporation of Merchants. He also may be said to be a Merchant, who by common fame and in the opinion of men is commonly reputed a Merchant. (r) They that buy Wares or Merchandizes to reduce them

(p) L. Unic.  
Cod. de  
Nund. & Al-  
ceat, in L.  
Mercis 66. &  
l. Mercis 207.  
de Verb. Sig-  
nif.  
(q) Accurf. &  
alii in l. 1. §.  
Mercis. ff. de  
Trib.

(r) Bart. in  
Rub. Cod. de  
Navic.

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by their own Art or Industry into other forms then formerly they were of, are reputed rather Artificers then Merchants; (s) unless by their order they are so transformed by the art and industry of others upon design of selling the same to gain thereby, in which Case they may be said to be rather Merchants then Craftsmen or Artificers. And such as buy wares for present money, that without altering the form thereof they may sell the same at a future day of payment at a far dearer price then they were bought, are reputed rather *Usurers* then *Merchants*. (t) But Bankers, Money-changers, and such as deal by way of Exchange are reputed under the notion of Merchants. (u) For whereas it is formerly said that a Merchant deals only in *Moveables*, understand that Money is comprised under that notion. (w) So also are Ships.

The Isle of *Rhodes* anciently was the only Mart of Trade and Commerce in the whole world; Antiquity describes that Isle and the City thereof as the only *Metropolis* of Merchants; who, though they have a Latitude as wide, as the *Ocean* in point of Trade and Negotiation, yet they may not in time of war transport Prohibited Goods or Commodities to an Enemy, though designed for the Redemption of Captives. (x) Yet such is the Reputation of Merchants, that Credit is generally given, without the least distrust, unto their Count-Books, unless some Legal Exception may be raised against the same,

(s) *C. ejiciens*  
85. dist.

(t) *C. in civitate. & c. consultavit. Extra. de usu.*

(u) *Paul. de Castr. in L. incum. ff. de inst.*

(w) *L. movensium. ff. de Verb. Sign.*

(x) *C. significavit. Extra. de Jud. x. ubi Abbas.*



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same, or other just cause of suspicion. (y) And whereas each Merchant hath his peculiar Mark wherewith his Goods are usually marked, by way of discrimination from the goods of other men, the Law in favour of so laudable a Custome doth presume the goods to be his, whose mark is thereon affixed; Not that such marks, abstracted from other Concurrent Evidence, do of themselves amount to a full proof; only they induce such a Presumption, as doth (without stronger evidence or presumption on the other side more energetical) carry the possession for him whose marks they are; Nor is it therefore less hazardous then unlawful for one Merchant to make use of anothers Mark. save when in time of war they strain a point to drive a Colourable Trade, which, with other the like stratagems, the Law will interpret no other then *Solertia* or *Dolus bonus* rather then Trade shall be totally obstructed, or the Merchants quite discouraged; and where the goods controverted happen to have the marks of both the parties litigant, in that case his is the best Condition who hath the Possession, till by the other party better Cards can be shewed for the Property; (a) for a presumption ground only upon the marks must ever give place to a Proof of the Title or Property grounded upon an Emption, Permutation, or the like. (b) Nor may the Plaintiff *pendente lite*, make use of that mark touching which the Dispute

(y) Decii Confil. 40. nu. 3. & Confil. 496. nu. 9.

Bald. in Auth. Dos data. Cod. de Donat. ant. Nupt.

(a) § Commodum. Instit. de Interdict.

(b) L. intra. §. vendentibus. ff. de Minor.

or

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or Controversie is, till there be a Decision in the Case. (c)

(c) Bald. in L.  
1. Cod. Ut ne-  
min. Liceat  
sine Jud. au-  
toritar.

*The Skipper or  
Master is a  
Mariner,  
though no  
common Mari-  
ner.*

The Interest of the Merchant mainly depending on the Mariners, it concerns him to know wherein their Duty consists; a right understanding whereof is not with more facility attainable then by a due persension of those things which the Law it self ascribes as faults to Mariners; such in part as these; viz. The Mariner may not set sail when under an Embargo or other restraint of Princes; nor in Tempestuous weather; nor after the time limited by Contract; he may not during his Voyage in reference to Ship or Lading, do ought misbecoming an honest, able, skilful, and prudent Mariner; he may not stay in Port or Harbour without cause when a fair wind invites his departure; he may not deviate in his Course without just cause, or steer a dangerous or unusual way when he may have a more secure passage, yet to avoid illegal Impositions, he may somewhat change his Course and be excusable; (d) he may not unlade his Merchants Goods into another Vessel; worse then his own; he may not lade any Goods into a leaky or insufficient Vessel; he may not over-charge or over-lade his Ship; nor stowe Goods above her birthmark; he may not sail without able and sufficient Mariners, both for quality and number; he may not voluntarily sail by places infested with Pirats, Enemies, or other places notoriously known to be unsafe: he may not

(d) L. cum in  
debito. ff. de  
Probat.

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not transport persons of an obscure and unknown Condition, without Letters of safe Conduct, or other suspected persons, to the rendring Ship or Lading liable or subject to a seizure or surreption; he may not lade any Prohibited or unlawful goods, whereby the whole Cargo may be in danger of Confiscation; he may not use any unlawful Colours, Ensigns or Flags, whereby his Ship or Lading may incur a seizure; \* he may not, being haled at Sea, behave himself otherwise then becomes a Prudent Master; \* L. 1. Col. de Navib. non Excusand.  
he may not carry counterfeit Cocquets or other Fictitious and Colourable Ship-papers to involve the Goods of the Innocent with the Noerent; he may not with his Vessel engage among the Rocks, being thereto not necessitated by the violence of wind and weather, nor by night deceived or deluded by false Lights; he may not refuse payment of the just and ordinary Duties, Port-charges, Customs and Imposts, to the hazarding of any part of his Lading; he may not sail with insufficient Rigging, or Tackle, or with other or fewer Cables and Anchors then is requisite, respect being had to the Burthen of the Vessel; he may not sail with other Ship provisions then what is good and whole some and sufficient for the Voyage; he may not neglect the well moaring of his Vessel in Port; he may not sail without one Cat or more in his Vessel; he may not suffer the Lading to take wet, to be stolen or embeziled; he may not permit Debates or  
Contests

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Contests among his Mariners, to the prejudice of the Merchants Goods; he may not let open the hatches of the ship, to endanger the lading; he may not prejudice any part of the Lading by any indiscreet or unskilful stowing of the Goods, respect being had to quantity, nature, and quality thereof; he may not take up more money upon *Bomree* or the Gross Adventure then his Interest is in ship or Lading; he may not contrary to Order touch at Ports, not necessitated thereunto by contrary winds or otherwise. Many other are the faults and miscarriages incident to Mariners; these only by way of hint to Merchants, who are the greatest sufferers hereby, having herein very seldome equivalent reparation, the offenders for the most part not sufficiently solvent.

(e) L. Prætor  
ait in Prin.  
ff. de Injur.

(f) L. non om-  
ne, ff. de Stat.  
Libe. & l. in,  
ff. de Act. &  
Oblig.

But here note that he that will charge a Mariner with a fault in reference to his Duty must not think that a general Charge is sufficient in Law, but he ought to assign and specify the very fault wherewith he is so charged. (e) In like manner he that will infer such or such a sad disaster to have happened or been occasioned by reason of some fault in the Mariners, must not only prove the fault it self, but must also prove that that fault did dispose to such a sad event, or that such a misfortune could not have happened without such a fault precedent; (f) wherein the Mariners tho' legally qualified as good and competent witnesses for acts done a ship-board,

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ship-board, (g) yet to exculpate and ex- (g) L. Consen-  
 cuse themselves, they are not witnesses with- su. Cod. de  
 out exception, save in certain Cases wherein rep.  
 the Law allows them a toleration by way of  
 Juramental purgation; and in case of  
 loss or damage to the Lading or any part  
 thereof by reason of such disaster occasion-  
 ed by, or in consequence of such fault of the  
 Mariners, the Merchant hath his election  
 in Law, whether he will sue the Master or the  
 Owners of the Vessel, (h) only he can re- (h) L. 1. §. 1. igitur, ff. de Ex-  
 cover but of one of them; And having  
 once determined his election he ought to  
 stick to that; in which case if the Master  
 happen to be Judically condemned by rea-  
 son of any default in his Mariners, he may  
 detain their wages till payment be made, and  
 satisfaction given for such damage as he suf-  
 fered by their neglect; for they ought by the  
 Law to refund it out of their wages. (i)

Ships and other Vessels of that kind were  
 Originally invented for use and profit, not  
 for pleasure and delight; to plow the Seas,  
 not to lie by the walls; therefore upon any  
 probable design the major part of Part-  
 Owners may, even against the consent, tho'  
 not without the privity and knowledge of  
 the minor part, set a Vessel to Sea, under  
 such provisions, Limitations, and Cautions,  
 as by the Law is in that behalf provided;  
 yea, the same thing may be also effected by  
 the one part only, in case of equality in  
 Partnership. (k) But in the choice of a  
 Master where there are several Part-Own-

(i) Aret. post  
 Joan. Fab. in  
 §. item Exer-  
 citor, nu. 3. In-  
 stit. de Oblig.  
 quæ ex quasi  
 Delict.

(k) Bart. &  
 Paul in l. hæc  
 distinctio. §.  
 cum fundum,  
 ff. Locat

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ers of the same Vessel, not always he that is chosen by the major part but he that is best qualified for that employment, is according to Law most eligible and to be preferred.

(l) L. non aliter, ff. de usu & habi.

(m) L. interstipulantem, in §. Sacram. ff. de Ver. Ob. lig. & in l. quod in §. fin. ff. de Leg. & in l. quires, §. aream, ff. de Solut. & in l. quid tamen, in §. in Navis. ff. Quib. mod. Usutr. amic.

(n) L. Mutius, ff. de rei vendic.

(o) ff. lib. 6. tit. 1 Leg. 61:

(l) If a ship be ript up or taken abroad into peices, with design of converting the Materials thereof to some other use, and it be afterwards upon other advice or change of mind re-built with the same Materials, This is now another and not the same ship, (m) specially if the keel be ript up or changed, and the whole ship be at once all taken asunder and re-built; it is otherwise if it be ript up in parts or taken asunder in parts, and so repair'd in parts; In which Case it remains still the same ship, and not another, albeit it be so often repaired, that in tract of time there remain not one chip of the Original Fabrick. And although a man repair his ship with plank or other materials belonging to another, yet the ship shall not be his to whom the materials belong, but remains his who repaired it. (n) It is otherwise if one takes another man's planks or materials prepared for the use of shipping and therewith build a Vessel; for in that case the Owner of the materials shall be Owner also of the ship, for the property of the whole Vessel follows the Keel thereof. (o) But if one prepare Tables and other Implements, as for the use of a dwelling house, or the like, with Oke or Deal belonging to another man, and afterwards with those Implements build a ship or other Vessel;

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Vessel, in this case the ship is his who built the same. (p) If a ship be bought, together with all her Tackle, Apparel and Furniture, and other Instruments thereto belonging, in this case and by these words the ships boat is not conveyed. (q) And therefore if by reason of any offence the ship happen to be forfeited or confiscate, the said ships boat is not confiscate. (r) If one doth sell that ship or Vessel, wherewith he hath exercised the detestable acts of Piracy, whether the parties that suffered loss by such depredations, have any remedy in Law against such ship now bought *bona fide*, or against the buyer thereof now *bona fidei possessor*, is a question much controverted; Some are of opinion that he hath no remedy in Law, because the ship is a senceless thing, and not capable of offending. (s) As also, because the buyer thereof (supposing him not conscious of any such depredations, nor privy to abettor or pertaker thereof) ought not to suffer being innocent; (t) Others are of another opinion, for that it is lawful for every man to seize the goods of Pirats, (u) especially for that there lies a tacite obligation on the goods of all offenders for satisfaction; (w) whence some infer that the Merchants who are so despoyled of their goods, have a Legal recourse for satisfaction on the Pirats goods wheresoever or in whose hands soever they find them. But the more received opinion is, that whereas it is held lawful for every man to apprehend the goods of Pirats

(p) L. si ex meis, ff. de acq. rer. dom. & l. si convenit, §. si quis sic, ff. de ping. act.

(q) L. fin. ff. de fund instruct. & l. Scapham, ff. de evict. & l. Marcellus, in §. arma-menta, ff. de Rei Vendicat.

(r) Bald. in L. cum proponas Cod. de Nautic. fenore. n. 6.

(s) L. 1. ff. si quo ad. pau. fe. di.

(t) Jas. in consil. 107. Nominis Magnifici, &c. Vol. 2.

(u) Bald Paul. & Sal. in l. autem navigat. Cod. de furt.

(w) Bal. in l. furt. Cod. de furt.

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Pirates and be blameless, it is meant and intended only so long or whilest they are the goods of such Pirates; (x) unless you can also affect the possessors of such goods with a participation of the same crime. And if any do *bona fide*, either buy or redeem a ship or other goods from such Pirats he may upon restitution thereof to the true Proprietor recover of him the price of such empti-

on or the Redemption money. (y) If a ship or other Vessel by stress of weather or through fear of Enemies or Pirats, be forced or chased into a Port, no Duties or Customes or other duties in that case ought to be exacted or paid. (z)

(x) L. in delictis. §. Si extraneus. ff. de Noxa & Angel. in l. Sive manifestus, in §. tam diu. ff. de Com. fur.

(y) L. mulier. ff. de Captiv.

(z) L. fin. §. si propter necessitatem. ff. de public. xl. C. l. c. ff. de Public.

*Wearing Apparel and Victuals for the ships use, pays no freight. ff. Naut. Caupo. tab. &c. l. i. §. quancunque rem.*

(a) L. si quis Cod. de Instit. & Substit.

In freighting of ships, respect is had either to the ship it self, or else to a certain part thereof; as also either by the Moneth, or the Voyage, or by the Tun; for it is one thing to freight a ship, another thing to take certain Tunnage to freight; So also one thing to be the Cape-Merchant, another to be an Under-fraighter; and the Law of freight ordinarily is regulated by the Contract, and varies according to the diversities of Agreement, for Convention makes Law. If freight be contracted for the *Lading* of certain Slaves, Cattle, or the like, and some of them happen to dye before the Vessel arrives to her Port of discharge, the whole freight is due, that is, as well for the dead as the living. (a) It is otherwise if the freight were contracted for the *Transporting* them, in which case freight is due for no more then are



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are alive at the ships arrival to her Port of discharge, & no freight due for the dead. (b) If it be not known or liquid, whether the Contract were for the *Lading* or *Transporting* them, the freight is due for the *Lading*, and consequently as well for the dead as living. (c) If freight be contracted for transportation of a Woman, and she happen during the voyage to be delivered of a child on Shipboard, no freight is to be paid for the said Infant. (d) If such misfortune happen to a Ship in her Voyage that she cannot proceed therein, the freight contracted for doth cease in some cases, only for so far and so much of the said voyage as the said Ship made before such misfortune, freight shall be paid. (e) If the Ship by reason of the freighters fault, as for Lading Prohibited Commodities, or the like, be detained or impeded, he shall pay the freight contracted and agreed; (f) The Lading of a Ship in construction of Law is tacitly obliged for the freight; yea the payment of freight is preferr'd before any other Debts to which the goods so laden are liable, albeit such Debts in time were precedent to the said freight. (g) If a set time be fixed and agreed between the Merchant and the Master, wherein to begin and finish a Voyage, it may not be altered by the *Supra-Cargo* without special Commission *ad hoc*; nor may the Master sail after the time Covenanted, without refunding the damage out of his owne purse, in case any happen at Sea after the said time. (h) A

(b) Promise

(b) Arg. l. Scio ff. de annuis legatis. & l. illis libertis. in. fin ff. de Condit. & demon. arg. 7.

(c) L. qui operas. & l. si ædes §. cum quidam. & §. fin. ff. locati. (d) L. Sed & addef. in §. Si quis mulierem. ff. Locat

(e) Paul, in l. si uno. in §. cum quidam. & §. ubicunq; ff. locat. & Sign. de Homod. Consil. 195. nu. 6.

(f) L. penult. §. novem. ff. Locat.

(g) Bald. in L. certi juris. in 4. q. in verb. Quid ergo. Cod. Locat.

(h) L. Qui Romæ. §. Callimachus. ff. de verb. Obl.

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Promise being made by a Master of a Ship to sail to *Venice* from the Port of *London* in two moneths, the Promise is performed if he begin to sail the said Voyage within the two moneths, though he arrive not at *Venice* within the said time. (i) And the failing from one Port to another, thence to a third, fourth; &c. And so home to the Port whence she first set sayle, or some other Port of her last discharge, is all but one and the same Voyage, (k) so as it be in Conformity to the Charter Party.

As there is no Art more Necessary, so none more dangerous and uncertain, then that of Navigation; insomuch that *Bias* the Philosopher (One of the seaven *Grecian* Sophies) had a Conceit that Navigators and Mariners when under Sail, might not properly be reputed either among the Living or the Dead; and *Plutarch* in the Life of *Cato* relates it as one of *Cato's* Three Penitentials at his death, if ever he conveyed any thing by water when he might have done it by Land; hence it is that the Law is so favourable in Cases of Wreck, and in nothing more consults the reparation of any, then such as by that deplorable Casualty are reduced to misery. Now no man by the Law may be prohibited or denied the Liberty of Sailing either upon the Seas or any publick Rivers. (l) that is, no man may be denied that freedome, or prohibited by any private persons or other who have not *Jura Regalia* in that Territory, for some Princes and States have

(i) Ang. Alex.  
& Jason in  
dist. §. Calli-  
machus.

(k) L. Relega-  
ti ff. de per-  
nis. & l. ult. ff.  
de Sep. Viol.

(l) L. 2. §. Si  
quis in mari.  
ff. Ne quid in  
loc. publ. & §.  
& quidem.  
Inst. de re-  
rum. divi. &  
l. uni. ff. Ut  
in flum. pub.  
navigare li-  
ceat.

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have in all ages exercis'd that Prerogative in this point which no lesser Powers can pretend unto; Witness the City of *Peru*, in her Concessions, and Interdictions or Prohibitions, touching a Liberty or restraint of Sailing on the Lake of *Peru*; as also the like by the *Venetians* as to the *Adriatick* Gulf; (m) Not here omitting to make an honourable mention of that undoubted Sovereignty which the Kings of *Great Britain* in all ages have had in the Seas thereof. (n) Another duty of Merchants and Mariners is Contribution, which is not only in the Case of goods cast over-board for the Lightning of the Vessel, but also in Case of Redemption of Ship or Lading, or any part thereof from Enemies or Pirates (o) insomuch that if a Master redeem the Ship and Lading out of the hands of Pirates by promising them payment of a certain sum of money, for performance whereof himself remains as a pledge or Captive in the Custody of the Pirates; in this case he is to be ransomed or redeemed at the Costs and charges of the said Ship and Lading, ratably and proportionably as each mans Interest therein doth amount therunto. (p) And if there be Cash or money in the Ship; it is not in this case Exempt from paying its share of the Contribution proportionably to Ship and Lading because the Master knowing the said money to be a Ship board, was probably the more willing to Redeem the Ship, though at a dearer rate. In a storm when the Ship is

(m) Angel.  
Confil. 290.  
& Veronenfis.

(n) Bellissime.  
Seld. de Mar.  
Clauſ.

(o) ff. ad Leg.  
Rhod. de  
Iactu. l. 2. §.  
ſi Navis à Pi-  
ratis

(p) Diſt. §. ſi  
Navis à Pira-  
tis. & ibid.  
Juan-deHevia  
lib. 3. p. 2.  
Cur. Philæ.  
Naufragio.  
13. Inu. 18.

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in danger of perishing, it is not Lawful for the Master at his own discretion, without advice first had with the Merchants or their Factors or Supracargoes, to cast goods over board for the Lightning the Vessel, or to cut down the Mast, or the like ; but in case they consent not, and the Master see cause for it, he may even against their consents do the same, by the advice of the major part of his Mariners, who at the end of their Voyage are to make oath, that they did the same out of Necessity, and only for preservation of Ship and Lading, and by advice of the Mariners: And the Master in such case is to take as much care as in him lies, that such goods only be ejected and cast over-board as are of the heaviest weight, and least value ; (q) for which Contribution is to be made, wherein the ejected goods are to be valued as other of the same species are sold for ; and Jewels, though of no burthen to the Vessel, yet in such case are liable to pay their share of Contribution according to their value; And in such Cases the Custome of the place is to be observed ; for by the Custome of some Places the Oaths of the Master and a Third part of the Mariners are required, by the Custome of other Places the Masters Oath with two or three of his Mariners doth suffice. But if only the Ship it self, or any of her Tackle happen by stress of weather to be damnified, there is no Contribution for the same, though the Lading be all preserved. (r) Contribution is to be made and regulated in this

(q) Leg. Wisbitens, art. 20.  
21, 38, 39.

(r) ff. ad Leg. Rhod. l. 2. §. Si conservatis.  
*The persons of men, wearing apparel, and the Ships provisions are exempt from Contribution.*

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this man; First, the goods which are lost or were ejected for conservation of the rest, are to be valued and appraised; then the goods saved are likewise to be estimated, that so the values of each being known, a proportionable valuation may be contributed by the goods saved, toward satisfaction for the goods ejected, lost, or thrown over-board; wherein regard is to be had not to what might be got by the goods lost, but what the damage is by the loss thereof; which are to be estimated not so much by what they might possibly be sold for, as by what they cost or were bought for. Though in truth the more received practise and Custome is, that the goods saved and lost are both estimated as the saved goods happen to be sold for, the freight and other necessary charges being first deducted and the Estimation or Computation is to be made by such skilful Merchants and Mariners as adhere in their judgments and affections to neither party, farther then becomes indifferent Arbitrators; which may be managed with most equality and least suspicion or exception, if the appraisment be made upon oath. And if any in the Ship hath Money, Plate, Jewels, or the like, in any Trunk, Chest, Pack, Fardel, or other thing now to be thrown over-board, he ought to discover it and shew it to the Master of the ship before the ejection, or otherwise in casting up the Contribution, these things will come no farther into consideration, then what the bare Extrinsic value appeared to be. The goods

*Some are of opinion that the goods saved are to be valued as they may be sold for, but the goods lost as they were bought.*

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*Goods cast  
over-board to  
lighten the ship  
makes no Dere-  
lict. §. ult.  
Inst. de Rer.  
Divis. & l. 9.  
§. ult. de acq-  
rer dom.*

*(1) ff. ibid. l.  
navis. §. cum  
autem.*

*(1) Lusi Ser-  
nus. 27. §. &  
Si. 23. Ad  
Leg. Aquil.*

preserved are by Law as liable to pay Con-tribution as Freight, and are tacitely obliged for the one as for the other, and the Master may retain them as a pledge in Law as well for the satisfaction of the one as of the other; If such ejected goods or the Merchandize be afterwards recovered out of the Sea, the Contribution for them ceases, saving for so much as they are thereby deteriorated.

(1) But if by reason of the Masters over-lading the Vessel, or by his indiscreet stow-ing the Goods or the like, such ejection or casting goods over-board happen, in that case no Contribution to be made by the Merchants; but Satisfaction by the Ship, the Master, or Owners thereof. (1) If to avoyd the danger of a Storm, the Master cut down the Masts and Sayls, and they falling into the Sea are lost; this dammage is to be made good by Ship and Lading *pro rata*; Not so in case the same had happened by the Violence of the Wind or Storm, or other Casualties. Also no Contribution in case one Ship strike against another, whereby dammage happens; but full satisfaction in case of a fault or miscarriage in either, or an equal division of the dammage in case it happen by a meer Casualty. Lastly, if a Lighter, or Skiff, or the Ships Boat into which part of the Cargo is unladen for the Lightning of the Ship, perish, and the Ship be preserved, in that Case Contribution is to be made, Otherwise it is, in case the Ship perish, and the Lighter, Skiff, or Ships

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Ships Boat be preserved ; for no Contribution but where the Ship arrives in safety. (v) (v) L. Navis.

Within the Cognizance of the Jurisdiction of the Admiralty, and wherein Merchants and Mariners are principally concerned, are also all causes of *Reprizals*, known to us by the Words *Reprizalia* or *Letters of Marque*, which in the Law have also other Appellations, as *Pignoratio*, *Clarigatio*, and *Androlepsia*; For it is supposed that those Reprizals now commonly used, were first introduced in Imitation of that *Androlepsia* among the *Greeks*, with whom it was certain Right in case of Murder, to apprehend and seize any three persons whether Citizens or other of any such place or City, into which the Murtherer had fled for shelter, making it his place of Residence; and such persons to keep in safe custody, untill upon demand the said Murderer were delivered up to Justice; This was *Androlepsia* with the *Greeks*, which (as some suppose) gave an hint to other Nations for these Reprizals, which are now of practice more common then commendable. The word *Clarigatio* is more acceptable to express *Reprizals*, then either *Androlepsia* or *Pignoratio*; for *Pignoratio* is a word too *Generall*, and *Androlepsia* too *Special*, as being only by the Authority of such as required the Revenge of Murder, and upon no other accompt then that. The word [*Reprizals*] is from the *French*, *reprendre & reprise*, that is, to Retake, or to take again one thing for another ;  
albeit

ff. Ad. Leg.  
Rhod. de  
jactu.

Demosthen.  
in orat. in  
Aristogit.

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albeit this may not be by any Private Authority, but only by the Authority of that Prince whose subject the Injured person is, and only in case Justice be denied or illegally delayed by that Prince whose subject the Offender is: For before any concession of Letters of *Reprizal* or *Marque*, there ought to precede the Oath of the party Injured, or other sufficient proof touching the pretended Injurie, the certain loss and damage thereby sustained, the due prosecution for obtaining satisfaction in a Legal way, the denial or proterlation of Justice, the complaint thereof to his own Prince, Requisition of Justice by him made to the Supreme Magistrate where Justice in the ordinary course was denied, persistency still in the denial of Justice; all which precedent letters of *Reprizal* (under such Cautions, Restrictions, and Limitations as are consonant to Law, and as the special Case may require) may issue by the *Jus Gentium*; for such *Law-Casists* as question whether *Reprizals* are lawful, are in that point rather Divines than Lawyers; *Grotius* who was both, resolves it in the Affirmative; (w) wherein *Nations* as well as *Persons*, the *Jus Civile* as well as the *Jus Gentium* agree the Legality thereof; whether you understand General and Universal *Reprizals*, which is *quasi Bellum Privatum*, or Special and Particular *Reprizals*, which is *quasi Duellum Publicum*.

The precedent Requisites being duely observed, *Reprizals* may issue by the Authority

(w) Grot. de  
jur. Bel. lib. 2.  
cap. 2. lib. 2.



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rity of the Prince, in whom alone resides the power as of making War and Peace, so also of granting *Letters of Marque*; And this notwithstanding any Lawes to the Contrary that seem to inhibit the same; (x)

But with respect to the National Treaties and Conventions, which in this point may at times vary and alter the Case in Conformitie to such National Contracts.

A due Administration of Justice is not the Least sense wherein Princes are stiled Gods; To deny or delay Justice is Injustice? Justice is every mans Right who hath not forfeited what he might claim by the *Jus Gentium*; therefore the Prince,

within whose Territories Justice is denied or delayed, is Accountable to that other Prince whose Subjects suffer thereby; and by the Law Subjects may be punished for their Prince's Omissions in what the Law of Nations requires. (y) And that Prince who unlawfully detains the Rights of a Subject under another Prince, or suffers it within his Territories to be detained, and in the Ordinary Course of Law denies Restitution,

he may at length be compelled to Restitution, *vi & manu militari*. (z) He that in the way of *Reprizals* apprehends at Sea another mans Goods, ought not to keep them in his own private Custody, and to Convert them by his own authority to his own private use, but ought to bring them to some Publick Place in order to a Judication according to Law; yet they

are

(x) Ne alius pro alterius debito & pena teneatur. Auth. & omnino, Ne Uxor Marito C. l. providendum. de Decurio. lib. 19. c. titu. Ne fil. pro patre. Auth. imo. C. de acti. Cum Similib.

(y) C. Si Sententia. c. 16. de Sent. Excom. in 6. Constit.

(z) L. qui restituere. De rei vindicat.

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are to remain with the Captors till by them they are thus brought and submitted to Publick Justice ; by the authority whereof Commission may issue for Landing or unloading the said goods, for Inspection, for Inventorying, and for Sale, either of such part thereof as upon such Inspection shall appear to be *Bona peritura*, or of the whole in case the Court shall see Cause, which is to order payment out of the Proceed thereof to the party to whose use the Letters of Marque issued for and towards satisfaction of his debt and damages, after deduction of all dues, duties, necessary Costs and Charges relating to the Seizure, either Judicially or Extra-judicially ; And the said debt and damages (with all Costs and Charges) being fully satisfied, the Remainder or Overplus (if any, which seldom happens in such cases) is to be Restored to their Owners from whom they were taken, and the said Letters of *Marque* thenceforward to cease. Such Letters of *Marque* issue not without good and Sufficient Caution first given in Court for the due observance thereof according to Law, the transgression whereof creates a forfeiture of such Judicial Recognizance or Stipulation ; and the Captor for the better management of a Judicial Proof, in order to a right Decision according to the merits of the case, is to produce part of the seized Mariners to be Sworn and Examined according to Law, as also to Exhibite all the Ship-papers and Evidences found a Ship-

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Ship-board ; and till Judication he may not break bulk of his own private authority, nor suffer any imbezilment of the Lading, nor Sell, Barter, or otherwise alter the property thereof, without Special Commission from the Court for so doing.

In the Law there are certain Persons and Things Exempt from being Lyable or Subject to Reprizals ; They whose Persons are Exempt, have also their goods Free. Reprizals granted against any Kingdome or State, are understood as against such only who inhabit therein, and not against such who though originally of that Countrey against which the Reprizals are, yet inhabit elsewhere, possibly in the same Kingdom whence the Letters of *Marque* issued ; for he is not in this point reputed of that Kingdome, State, Province or City wherein he doth not inhabit, albeit he were born therein ; It is not the place of a mans *Nativity* but his *Domicill*, not his Origination but of his Habitation, that subjects him to Reprizals ; the Law doth not consider so much where he was Borne, as where he Lives ; not so much where he came into the world as where he improves the world ; provided he hath there *Decenniated* or inhabited Ten years, or less, in case he hath born Office there, or paid *Scott* and *Lott*, or removed his Family thither, or his Estate, or the greater part thereof, or Naturalized a Denizon of that Countrey.

Reprizals may not be Exercised on Pilgrims,

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grims, or such as travel for Religion sake, nor on Students, Scholars or their Books, or other Necessaries; Nor on Ambassadors or thier Retinue; nor on Women or Children. Likewise Goods found with a Merchant of another place then that against which Reprizals are granted, albeit the Factor of such Goods were of that place, are not subject to such Reprizals; nor ought the presumption of the Place ( though strong enough for Condemnation where proof of an innocent property fails ) prevail against fuller Evidence. Ecclesiastical persons are also by the Canon Law expressly Exempt from Reprizals; So likewise such persons, as by Storm or Stress of weather are driven into Port, have an exemption from the Law of Reprizals according to the *Jus Commune*, what the Edict of any particular State in that case may doe, is not here determined; But a ship or Goods belonging to the Subjects of another Prince, against whom Reprizals are granted, coming into a Port, of that State, issuing such Letters of Reprizal, not by storm or streffe of Weather, but to avoid Confiscation for some delict committed at home in their own Country, may be subject to Reprizals in Port.

This right of Reprizals ( which as some would have it, answers to the *Saxon Withernam* ) is not only admissable in cases of denial, or protelation of Justice, as when Judgement may not be had within the time prescribed by Law, but also when Judgement

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ment is given plainly against the Law, and no Remedy to be had against such wrong Judgment, either in the ordinary course *per viam Provocationis A Appellationis ad Judicem superiorem*, nor in the extraordinary *per viam supplicationis ad principem*; understand thus when the matter in Controversie is *tam quod merita quam quod modum procedendi*, not Doubtful, for in Doubtful matters the Presumption is ever for the Judge or Court; but a wrong Judgment in matters not Doubtful must be redress'd one way or other, specially if such be given to the prejudice of Foraigners, over whom the Authority of a Judge though in his own Jurisdiction, is not so exactly the same, as over his own Subjects; And although it be a Rule in Law, *Res judicata pro veritate habetur*, yet it is as true that *Judex male judicans pro injuria tenetur*; nor doth a Judgment or a Definitive diminish the merits, though it may alter the Case; Therefore Paulus the Lawyer held, that a Debtor, that is a Debtor indeed, though Judicially absolved, yet by nature remains a Debtor still; and therefore when this happens to be a Foraigners Case, he may (if all other Legal Expedients fail) for redress have recourse to the *Jus Gentium*, which holds conformity with the Law of Nature. Subjects indeed may not by force oppose the Execution even of an illegal Judgment, nor forcibly prosecute their denied rights, and that by reason of the Energie of that Power and Authority which is over

### The Introduction.

over them, the Subjects obedience being in the Emphasis of the Magistrates Authority: But yet Foraigners can fly to the *Jus Gentium* to Right themselves by way of Compulsion, which they could not effect by any Legal prosecution, so long as their Right is reparable by Judgment according to Law, but infeasible by reason of the denegation or protelation of Justice, contrary to the regular proceedings of Law. It seems as least *Summum jus* if not *plus justo*; that the Goods of his Innocent Subjects that denied Justice, should be taken and seized for that Injustice, whereof they appear no more guilty then the original Complainers: The truth is, this is not introduced by the *Jus Naturæ*, but yet being commonly received by Custome and National practise, is now become qualified for an allowance or toleration by the *Jus Gentium*; whether this were sufficient for *Nestor* to plunder the *Elidenses* for taking away his Fathers horses, or for others on the like *peccadilloes* in this Age, to Centuple their Losses on their Innocent Neighbours for their Princes omissions under colour of Letters of Marque, is easier to question then proper to determine; But whether Christian blood should be engaged in the quarrel which originally was but of Private Interest, would soon be decided where no Military man hath the Chair. By the Law of Nations all the Subjects of the Dominion doing wrong, whether Natives or Strangers making their abroad there are with  
in

Hom. Illiad. 2.

## The Introduction.

in the reach of Reprizals; whereby 'tis evident, that Strangers not permanent there, nor under any of the aforelaid qualifications are excepted; for Reprizals being in their nature *quasionus Publicum*, are introduced for the satisfaction of Publick Debts, to which Strangers that are meerly such, are no way obliged; indeed to the Laws of the Land, where their present being is, they are subject, but yet are not Subjects. And whereas it is formerly said that *Ambassadors* are Exempt from *Reprizals*, as also their Retinue and Goods, understand it not of such as are Commissionated to any Prince or State in enmity or actual hostility against that Prince who issues such Letters of *Marque*. Lastly, by the Law of Nations in matters of Reprizals, what ever is taken, immediately upon the Capture accrues *ipso facto* to the Captor in point of property, so far as the Original debt or damage with all incident costs and charges doth amount unto, and the surplus to be restored; which Equity in this case the *Venetians* long since used to the ships they took on this accompt from the *Genuises*; But by the Civil Law, Monitions or Citations after a seizure ought to issue, and the parties concerned are not to crave for themselves, but submit the whole matter to a Judicial Examination, in order to their Satisfaction, which ought to ballance the *Damnum Emergens*, but not to exceed by way of Supplement in reference to the *Luctum sessans*; for the Law of Reprizals  
though

Grogor. lib. 9;

### *The Introduction.*

though otherwise rigid enough, yet *Restitutio in integrum* is its ultimate design; and as no man ought to be enriched by anothers Loss, so no man ought to gain by his own Loss, when it may not be repaired otherwise then by Remedies extraordinary; if not unlawful.

Having glanced at some general Heads of the Law of the Admiralty *quasi in transitu* by way of Introduction (the least whereof in its due Latitude requiring more Volumes then are Pages in this) and therein the *Custom* paid, with other ordinary Port-charges usual in such cases, It may now be free to sayl from the Law to the *Jurisdiction* of the Admiralty, being the Port of Discharge in the Design of this *Adventure*; The Wind seems Fair, the Seas well purged of Rovers, and *Nereus* reinvested with his Trident; The *Ensurance* therefore need run but Low, the Danger is not great now that we have Peace with all *Our selves*; yea, the Loss is but small though the Ship miscarry, so the Cargo be preserved, for that's of value, indeed a *Jewell*, without which the whole World would soon be *Bankrupt*; So that if it escape the private Arrest of some Fained or *Fictitious Action*, there is no fear of a General Embarg.

*Elenchus*



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*Elenchus Authorum ;*

O R

The Names of the Authors  
Quoted in this Treatise.

**Æ**schylus.  
Accursius.

Afflictus.

Africanus.

Albericus.

Alexander.

Alonzo de Chavez.

Andreas Masius.

Angelus.

Annot. in Sac. Bib.

Edit. 1651.

Aristotle.

Athenaus.

Aurelius.

Aul. Gellius.

Baldus.

Bartolus.

Bernar. Gerardus.

Boerius.

Boroughs.

Brownlow.

Bullenger.

Cains.

Caiciapulus.

Cagnolus.

Calvinus.

Calistratus.

Carbo.

Cassianus.

Castrensis.

Casus.

Cesars Comment.

Cælus Rhod.

Capolla.

Celsus.

Cicero.

Comines.

Consul del Mar.

Corp. Jur. Civil.

Corp. Jur. Can.

Codinus.

Coke.

Corvinus.

Cowell.

( c )

Crook.

# Elenchus Authoyum.

Crook,	Herodorus.
Curopolates.	Hevedin. Rog. He-
Curtius.	ved.
Cynus.	Hieron. de Chavez.
Cotheroen. Pet. Coth.	Hobard.
Demoſthenes.	Homer.
Diodor. Sic.	Horace.
Dion. Afric.	Huntindon.
Doſt. & Stud.	Jaſon.
Domin. Niger.	Iſernia.
Donellus.	Junius.
Durandus.	Juſtinian.
Faber.	Larrea.
Faſcic. de ſup. Adm.	Leonard.
in arce Londinenſi.	Leon. Marſiſc.
Fazellus.	Leunclavius.
Ferrandus.	Libanius.
Fitzherbert.	Littleton.
Fleta.	Livius.
Florus.	Lucius Florus.
Forſter.	Lupus de Magiſtr.
Fragm. Hiſt Aquit.	Mainus.
Fragm. Aſcript. Po.	Maranta.
lib.	Marſcius.
Fulgofius.	Malmesburienſis.
Galen.	Math. Paris.
Gellius.	M. ſius.
Gerardus.	MS. Adm. ſig. voc.
Godwyn.	Liber Niger.
Goldborrough.	Monſtrelaus.
Gothofred.	Moriſorus.
Granat. Deciſ.	Mouſius.
Greg. Gemiſt.	Noy.
Grotius.	Omphalius.

# *Elenchus Authorum.*

<i>Oleron-Sea-Laws.</i>	<i>Scardius.</i>
<i>Ortelius.</i>	<i>Scevola.</i>
<i>Oswaldus.</i>	<i>Selden.</i>
<i>Owen.</i>	<i>Seneca.</i>
<i>Panormitan.</i>	<i>Siffridus.</i>
<i>Papinianus.</i>	<i>Sigebertus.</i>
<i>Paris. Math. Paris.</i>	<i>Sigonius.</i>
<i>Paris de Puteo.</i>	<i>Speculator.</i>
<i>Paulus.</i>	<i>Spelm. Consul.</i>
<i>Paul Emil.</i>	<i>Spelm. Glossar.</i>
<i>Peregrinus.</i>	<i>Spiegelius.</i>
<i>Perinus.</i>	<i>Strabo.</i>
<i>Petr. Cotherson.</i>	<i>Suetonius.</i>
<i>Plato.</i>	<i>Suidas.</i>
<i>Plinie.</i>	<i>Tacitus.</i>
<i>Plutarch.</i>	<i>Tapia.</i>
<i>Polibius.</i>	<i>Terms of Law.</i>
<i>Pompeius Trog.</i>	<i>Theophanes.</i>
<i>Pomponens.</i>	<i>Thucydides.</i>
<i>Pruckman. Fred.</i>	<i>Tibullus.</i>
<i>Pruck.</i>	<i>Triphoneus.</i>
<i>Ptolimans.</i>	<i>Tullus.</i>
<i>Purchas.</i>	<i>Turpinus.</i>
<i>Purpureus.</i>	<i>Tuschus.</i>
<i>Ramus.</i>	<i>Valer. Max.</i>
<i>Ranulphus Castrensis.</i>	<i>Valer. Forster.</i>
<i>Raphael.</i>	<i>Victor.</i>
<i>Rhodia Leges.</i>	<i>Virgil.</i>
<i>Ridley.</i>	<i>Ulpian.</i>
<i>Roderig. Zamerano.</i>	<i>Vopischus.</i>
<i>Rupertas, alias Ro-</i>	<i>Zamerano.</i>
<i>bertus le Monachus.</i>	<i>Zasius.</i>
<i>Sabellicus.</i>	<i>Zonarus.</i>
<i>Salycet.</i>	



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## Admiral Jurisdiction.

C H A P. I.

*Admiral: the Etymon or true Original of the Word; with the various Appellations thereof.*

**T**HE Glossographers and others have digg'd very deep to come at the Root of this Word; Some are of opinion that the word *Admiralins* is derived from the Greek *ἀλμυρὸς Salsus*, or from *ἀλμυρὸς Salsugo*, or *ἀλμυρὸς Salsigo*, or from *Ἀλμυρῶν & ἡ Ἀλμυρὸς quasi Salmacidus & Salsus*, a *Salsugine Elementi cui imperat*: (a) from the Saltnefs of that Element where properly his Authority and Jurisdiction doth reside; (b) *vel quod in falso mari suum exercet imperium.* But

(a) Lupus de Magistr. Paul. Emil. Hist. de Fran. Guaguin. & Morisot. lib. 2. c. 3. de Orbe Maritimo.  
(b) Morisot. lib. 2. cap. 7.

B                      this

this not seasoned with sufficient reason, is held but as an unfavoury derivation, from the great improbability that any in imposing of *Names* should quit the thing it self, wherein the Denominated is most inherent, and fly only to the more remote qualities thereof; As if you should say, that the *Admiral*, in *rebus Maritimis*, were rather *Salinarius*, than *Marinarius*, as is truly observed by the Learned Sir *Henry Spelman*. (c) So that if you offer this Derivation, though *cum grano vel mica Salis*, it will not pass.

Therefore others are of opinion, that it is derived from the *French* [*Aneral*] signifying an high Officer or Magistrate in Sea-Affairs; But this is as if you should say, (to keep to the Metaphor of a Liquid Element) That Ice dissolved is the Mother of Water, rather than Water frozen the Mother of Ice; No doubt but [*Aneral*] in *French* now signifies such an high Officer or Magistrate; but where was that *French*-word [*Aneral*] when the Office of *Admiral*, by other Appellations almost homophonous to that, was in being, but not in *France*? That Office by other Names Appellative not much dissonant to this of *Admiral* was anciently known in the World, when no such thing in *France*; for the *Romans* themselves anciently had not these *Admirales* (for so then called) till *Constantine*, in whose time isti *Admirales Magistratus creati sunt*; (d) that is, among the *Romans*; for they were known to other parts of the World long before *Constantine* the

(c) Spelm.  
Gloss. verb.  
Admiral.

(d) Petr. Co-  
rhereau in  
suo Scholul.  
Magist. Civil.  
et. de Praefi-  
bus Provin &  
Purpur. ital. .  
col 309. Ex-  
emp. Dig. de  
Offi. ejus cui  
mandata &c.  
Callist. in  
Caes. Glor.  
M. I. Part 9.  
Con. id 16.

the Great, Anno 330. So that it may be truly said that this high Officer or Magistrate in Sea-Affairs is in the French now rendred by the word [*Ameral*]; But not that the word *Admiral* is thence derived.

Therefore others conceive it is derived from the Saxon *Aen Mere cal*, that is, *over all the Sea*. This passes for a currant derivation and exposition of the word *Admiral* with us; possibly because it sounds both so prettily and pithily; for we are now as apt as our Neighbours tother side the water to be *alamoded* as well with fine words as other vanities. Yet this being a derivation of our own *Generation*, it may not be much controverted, specially for that others as well as those of our own Nation, have acknowledged the word *Admiral* to be derived from the Saxons, with whom the word [*Hadmiral*] doth signifie *Præfectum maris*.

Others there are who will have it derived from neither of these, but from the *Sarazens*, [*Admirantes*] for that in the Infancy of that Empire there were *Quatuor Admirantes, hoc est, Militum Præfecti, qui terra marique pugnarent.* (c) But some think that this opinion hath no farther truth then in appearance only; for that the *Sarazens* had no farther use of that Office than in the *Holy Wars*. Therefore those *Ancients* that derive the word much higher than the time of the *Holy Wars*, will have it drawn rather from the *Greek* than *Arabick*; So that they seem to come nighest of any to the truth,

(c) Morisot.  
Orb. Marit.  
lib 2. cap. 3.

that derive the Pedegree of this word *Admiral* both from the *Greek* and *Arabick*.

For that *Amir* in the *Arabick* signifies *Princeps*, *Præfectus*; And *ἄριστος* in the *Greek* *Marinus*, both which amount to *Admira-*

Anno 1216. in H. 3. Matth. Paris, viz. In the Wars between the Christians and the Sarazens, in the Land of Promise, That John K. of Hierusalem with Christs Militia Castellatum ab equo stravit, & Admira'dum unum.

Admirakdum capio pro Centurione five Capitano, says the Gloss. on that word, in that place. And the said Matth. Par. Anno 1244. in H. 3. viz. Potestas Januæ, quem Admiratum vocant. The Gloss. there, viz. Ille Potestas, Podesta, five Prator urbanus, Nunc dierum Admirallii five Thalassiarchie munere fungebatur.

lius, or rather to *Amiralus*, quasi *Princeps vel Præfectus Marinus*. And this carries the greater probability with it, for that, as the said Sir Henry Spelman observes, such *bi-lingue* Compounds were much in request at the Court of the Eastern Empire; And it seems yet the more probable, for that in *Homer* we find the word *ἄριστος* pro *Rectore maris*, or Governour of the Sea; yea, and for *Neptune* himself. Wherefore *Amir*, otherwise *Emir*, also *Amira*, *Amira*, *Amiras*, and *Amiradis*, do signifie *Regem*, *Principem*, *Eparchum*, and *Præfectum*; also

with the *Turks* and *Sarazens*, it sometimes signifies their *Great Emperours*, and sometimes their *Proto-symbol* or *President* of the *Senate*. And so the *Arabick* [*Amira*] or the *Hebrew* [*Amar*] that is, *dixit, edixit: illud præcepit, imperavit*; from whence [*Mamurem*] that is, *præceptum, edictum*; And [*Amirom*] that is, *Dux, Capitaneus, Imperator, Præfectus*. And so *Ἀρχων* or *Ἀρχος* in the Compound; from whence

[*Alamiro*]

[*Alamiro*] (with the Article *al*) ὁ χιλιάρχος, the chief Captain. And from hence the Spanish [*Almirante*] or according to their ideom, *el Amirante*, and thence by turning *l* into *d*, the word *Admirans* by some hath been used for *Admiral*; whence others also though very corruptly, yet by reason of their being so Consonant, have given it other such like names, as *Admirabilis* and *Admirandus*; which words, if compared with the former, will, in the sense of such as have so express'd themselves, be found to be rather *Synecstagorematical* in their Signification, than *Homophonous* in their Accent or Pronunciation: And therefore the said *Archiologist* conceives that the word [*Amiratus*] (which in *Malsb.* is so often used for *Admiral*) is not thence derived, but rather from [*Amiradis*] the Genitive singular of the foresaid *Amiras*, by an exchange of *d* for *t*, as was usual; and adds, that the word (*Admiraldus*) is very Legible in the Antiquities of *Turpin* and *Rupert* or *Robert the Monk*, (f) *quasi Al Admiradus*; that is, ὁ ἀμειράς, and by an Apocope of the Letter *d*, *Admiral*, (g) which others will have to be express'd by the word *Admirarius*. (h)

(f) This Rob. the Monk was one of K. John's three Embassadors to Muramulium K. of Morocco, to signify his pleasure to him, how ready he was to resign his Kingdom.

(g) Fragm. Hist. Aquit.

(h) Leon. Muric. in castens. Hist. lib. 3. cap. 44.

This high Officer or chief Magistrate in Marine Affairs with us is styled the Lord high Admiral of *England*; with the

About Anno 1213. when K. John sent Thomas Herdinton, Ralph Nicholson, and Robert the Monk, to the K. of Morocco, we read, Misit Nuncios ad Admirallium Murmelium, Regem Magnum Asirica, Macrochix, & Hispaniæ, quem Vulgus Miramulinum vocat.

Matth. Par. in Johannem Reg.

Ita, sed satis Corrupte, Regem Morocce indigitarunt Nostrates. Sed Corruptius adhuc Roger. Hovedin. Almiramisi live Almiramimoli.

Hovedin. pars poster. in R. 1. pag. 381.

Drungarius Magn. Fragm. Acript. Polyb.

Greeks *Ἀναγῆς, ἀναγῆς, ἀναγῆς*; with the Latines, *Amira, Amiras, Amireus, Ammiratus, Admirallus, Admiralis, Admirans, Admirandus, Admirabilis, Admiravisi, Almiramisi, Admiralius, Amiralius*. In the Eastern Empire, *Amerii, Admirantes*; also *Drungarius, Drungarius Magnus, Drungarius Classis, Drungarius Navigiorum, Drungarius mari Præfectus*. With the Athenians, and others, *Thalassiarhus, Archithalassus, Magistratus rei Nauticæ Jurisdictionem habens*. With the Romans there were *Duum viri Navales*, afterwards *Præfectus maris, Præfectus Classis, Magnus Dux Classis, Archigubernius*. With the Spaniard, *Almirante, el Amirante, Adelantado*. With the French; *L' Amiral, Præfectus maris & Litoris, Custos Limitis Maritimi, Comes Litoris*. Besides these there are several other Apellations of this one and self-same high Officer, consonant unto the Idiom of such Nations and Countries respectively, where this great Office hath been constituted.

This word *Admirallius*, how it should signify *Bellicosus* or *Victoriosus*, as *Mat. Paris* hints,



hints, (i) seems not easily to be resolved without a far strained Notion; for, without doubt, of all the presupposed *Etymons* of that word, that which *Junius* gives, seems to be the most Legitimate, that from the *Arabick* [*Amira*] *Princeps*, and the *Greek* ἄλις *Marinus*; it being generally agreed, that this word is a Compound of an Exotick Extraction from two distinct Languages or Tongues; And therefore although *Greifernus* (k) he pleas'd to be displeas'd with this derivation thereof yet it is supposed that others without the least hazard of Naufragating their Art of Glossography, may securely cast Anchor and safely acquiesce therein.

(i) *Matth. Paris* in R. 1. Circa dies istos Rex de Maroch. potentissimus, quem Mirabilem mundi Vulgus, vel quod melius, Admirallium Murmalin, id est, Admirallium Bellicosum & Victoriosum nominavit.

Et An. 988. Otho. 3. Imp. German. cognomin. Otto Rufus, iste cognominabatur Mirabilia Mandi.

*Sissrid. Epit. lib. 1. p. 689.*

(k) *Glossur. in Matth. Paris in verb. Admiral.*

## CHAP. II.

*The Original of Navigation, and the Sea-Laws; with the Antiquity of the Office of Admiral in the Transmarine or Foreign Parts of the World.*

THE World was no sooner Created, but Man had Dominion over the Fish of the Sea, *Jure Divino*, which could not well be without *Naval Architecture*, and some skill in the Art of Navigation; And it is now no less then nigh 3952 years since *Noah*,

*Gen. 1. 25.*

Gen. 6. 14. &  
7. 24. & 8. 3, 4.  
The Antiquity  
of Navigation.  
(a) Fazell. l. 7.  
Decad. 2. Rer.  
Sicul. & Mori-  
for. Hist. Orb.  
Marit. l. 1. c. 1.

that *Torius orbis Thalassiarthus*, or High Admiral of the whole World in that general *Cataclysm*, with his Ship, or Vessel, called the *Ark of Gopher*, laden with a Cargo of the whole *Universe*, after a nigh six months Voyage safely arrived at *Ararat*, his Port of Discharge in *Armenia*; which though re-peopled by his Progeny, yet thence to believe and affirm, (a) That by Naval Acquisitions his Son *Sem* proprietated all *Asia*, his Son *Japhet* all *Europe*, and his Son *Cham* all *Africa*, is more than a meer Historical Faith hath sufficient warrant for, though less than Navigation hath *Antiquity* to possibillitate.

(b) Sabellic.  
Ænead. l. 1. l. 1.  
& 4. Plutarch.  
in Theseo.

(c) Thucid.  
l. 1. c. 1.

(d) Moris. Ubi  
supra.

Whether *Jupiter* King of *Crete*, now the Isle of *Candia*, did purge the Seas of Pirates, and his Son *Minos*, by Sea-fights, beat the *Athenians* into Tributaries, is also a Question more ancient than certain, or easie to be resolved; (b) yet that *Theseus*, Son of *Ageus*, King of *Athens*, vanquished *Taurus* then High Admiral to *Minos*, is asserted by good Authority, (c) and drowned him in the Sea, hinc *Fabula Minotauri*. (d) But the Master or Steersman of *Theseus* his Ship, not remembering to advance to display the *White Eagle*, as the *Ensign* of *Victory*, at his approach on his Arrival to *Crete*, his Father *Ageus*, betwixt fear and fury, cast himself headlong into the Sea, which gives it the name of the *Aegean Sea* in the *Archipelago* to this day. In those days lived *Dædalus*, who to avoid the Tyranny of *Minos*

nos fled from *Crete* into *Sicily*, but the wings wherewith he is feigned to have fled, the more modest *Mythologists* expound to be only the *Sails* of his Ship. (e) Some (e) Greg. Geomist. lib. 1. Rer. Græc. are of opinion, that former Ages were ignorant of this Art of Navigation, for that they ingraved *Non Ultra* upon *Hercules* Pillars: The Nations about *Pontus* supposing no Sea in the World like their own, and doubting whether there were any other Sea than that only; whence *Pontus* became a word used for the Sea in general; though *Prometheus*, according to *Æschilus* the *Attick* Poet, doth challenge all the glory of this Art of Navigation to himself; whom, among others who boasted themselves as Authours of this Art, the *Rhodeans* envying, presumed to give Laws, and to prescribe the Rules of *Naval Discipline*, in order to the better government of *Maritime* Affairs, (f) which were now occasionally introduced into the World by this Art of Navigation; which Laws are found dispersed among the several Titles of the *Civil Law* by command from the Emperour *Justinian*.

This Island of *Rhodes* in the *Mediterranean* or *Carpathian* Sea, was by reason of the multitude of their Shipping and great Commerce, (g) no less famous for their *Sea-Laws*, than for their Monstrous *Colossus*; (g) Gloss. mag. in l. 1. ff. Ad Leg. Rhod. & in Decr. dist. 2. c. Rhodiar.

in all the World ; This appears by that memorable and known passage of the Emperour *Antonius Pius*, who in Answer unto *Eudemus's* Complaint concerning the seizure of his ship-broken Goods by the Customers of the *Cyclides* in the *Archipelago*, refers him for Justice to the *Rhodian* Laws, professing that although he were Lord of the World, yet the Law was of the Sea. (h) To which *Rhodian* Law several other Emperours, as *Tiberias*, *Hadrian*, *Vespasian*, *Trajan*, *Lucius Septimus*, *Severus*, and others, do refer all Maritime Controversies; (i) yea, for many hundred of years the *Mediterranean* and most parts of the Christian Ocean, where any Traffick or Commerce was, subscribed to the Law of *Rhodes* in the Decision of all Matters of Admiralty Cognizance.

But some there are who by no means will admit that the *Rhodeans* should thus Monopolize the Glory of advancing the Common Interest of Mankind, as if the Law of the Sea was born into the World only by their Obstetricy; and therefore will have the Origination of the Sea-Laws attributed to the *Phœnicians*; who as they are by some accounted the Authors of *Arithmetick* and *Astronomy*, so also of *Navigation*; whence is that, *Prima ratem ventis credere docta Tyrus*. They were the First that took the observation of the *North-Star* in supplement of that Naval Mystery. These *Phœnicians*, who came with *Cadmus* into Greece,

(h) L. de prædatione. ff. Ad Leg. Rhod. & Leunclavius. ubi supra, in Leg. Rhod.  
(i) Leunclavius. in prin. L. L. Rhod.

Tibullus.

as they Civilized, the *Gracians* by their Sciences and other Literature, (l) so they exceedingly debauch'd them by their Luxury, and insatiable Avarice, which together with their Wares and Merchandise they first imported into Greece. (m) These were they that transported *Io* (whence the *Ionian Sea* is so called) out of Greece into *Egypt*; and were the First that descryed the *Two Poles*. (n) This *Phœnicia* is the Sea-Coast of *Syria*. (o) The *Greeks* call this Sea-Coast *Phœnicia*, but the *Hebrews* call it *Chanaan*, and the Inhabitants *Chananites*. (p) *Dionysius* also is of opinion that the *Phœnicians* were the First *Mariners*, *Merchants*, and *Astronomers*, (q) and *Tyrus* the *Maritime Metropolis* thereof; whose Trade and Commerce was so great and remarkable in that *Era* from *Adam*, and consequently her Pride and Luxury, that Less than Two whole Chapters of the *Sacred Record* will not suffice to describe the vastness of the one, and the Judgments of the other. This City *Tyrus* is there styled a Merchant; All whose Ships were made of *Firr*, their Masts of Cedar, their Oars of *Balsam* Oke, the Hatches of Ivory, the Waist-clothes, Vanes, Flaggs, and Pendants, of Purple and Scarlet, the common Mariners were the *Zidoneans* and Inhabitants of *Arvad*, their Calkers were the Ancients of *Geball*, and their Steers-men or Pilots were the wise men of *Tyrus*.

To these may be added the Inhabitants of  
Caria

(l) Herodot.  
Terpsi.

(m) Diodor.  
l. 5. c. 15.

(n) Morisot.  
in Orb. Marit.  
l. 1 c. 1.

(o) Strabol. 16  
(p) Andr. Ma-  
sius in Jos. 5.

(q) Dionys. A-  
fric. in vers.

Ezek. cap. 26,  
27.

cap. 27. v. 3.  
cap. 27. v. 5,  
to 9.

*Caria* in *Asia Minor*, for it is upon good Records of History that these also were anciently reputed Lords of the Sea; as also the Inhabitants of *Corinth*; Likewise the People of *Agina*, one of the Isles of the *Cyclades* and of *Egypt*; All these respectively have challenged to themselves this honourable invention of the Art of Navigation. (r) But the First that invented Ships on the Red Sea and sailed thereon, is said to be King *Erythrus*, whence the Red Sea took its name of *Erythreum Mare*. (s)

There are others who ascribe this Art of Navigation to the *Carthaginians*; (t) This seems to have more than *funum probationis* in it; for that these *Pæni* or *Carthaginians* originally were *Phæni* or *Phœnicians*, (u) it is most undeniable that their Naval Discoveries attempted by *Hanno*, (w) by *Hamilco*, and other *Carthaginians* are no less famous upon Historical Record, (x) than their Three great though unfortunate *Bella Punica Maritima*, when *Hannibal* himself was Lord high *Admiral*, which began in the 158 *Olympiad*, and concluded with the sad *Catastrophe* of that famous City of *Carthage*, then 700 years old, in the last year of the 158 *Olympiad*, (v) whereby *Rome* by her Conquests lost the glory of a Competitor for the Worlds Empire.

Now when the *Roman Empire* (which is so commonly mistaken for the *Beast* with ten horns, mentioned in the Prophet *Daniel*, with Teeth of Iron, and Nails of Brass; which

in

(r) Herodot. l.

1. &amp; Plin. l. 5.

c. 5. &amp; 19.

&amp; Athen. xus

Deipn. l. 1.

(s) Morisot.

ulli supra. The

Egyptians as-

sed to coast the

shores of the

Red Sea upon

Rafts, divided

by King Ery-

thrus.

(t) Plin. Nat

Hist. l. 7.

(u) Dom. Nig.

(w) Ramus.

(x) Diodor.

Sicul. l. 5. c. 7.

Gen. Chron.

&amp; Dom. Nig.

(y) Morisot.

Orb. Marit.

l. 1. c. 16 &amp;

Polyb. Plin.

Aurel. Victor.

Livie, Sabel.

Ennead.

Val. Max Si-

pon. Lucius

Florus, &amp; alii.

Dan. 7. 7, 19,

20.

in truth is meant of the Syrian Monarchy under the *Seleucide*, so called from *Seleucus Nicanor* ) was shattered and dilacerated, whereby a very dark and dismal Eclipse ensued generally on all Laws, Necessity then, which hath no Law, occasioned new Laws, and bad manners at Sea begat good Laws on Land, yet not so much a Creation of new Laws that never were before, as a Reviver or Resurrection of the former out of the Cinders of that fallen Empire, together with such Additional as Time, Experience, and Negotiations had administered occasion for, especially to such parts of the World as by their Neighbourhood to the Sea were most conversant in Naval Expeditions and Maritime Affairs. Hence it is, that in supplement of the forementioned Sea-Laws all the chief Towns of Commerce and Traffick on the *Mediterranean* contributed special Sea-Constitutions and Ordinances of their own for the better regulation of all Maritime Occurrences; Such were the Sea-Laws published by divers Emperours of *Rome*, also by the Inhabitants of *Pisa*, by the *Genoises*, by those of *Messene* in *Peloponnesus*, of *Marselleis*, *Venice*, *Constantinople*, *Aragon*, by the *Massilites*, *Barcelonians* and others. [2] As also the Laws of *Oleron*, nigh 500 years now Received by most of the Christian World, specially the *Mediterranean*, as the Legal Standard of all Naval Discipline, and for Decision of all Maritime Controversies; For the *Rhodian*

Vid. Annot. in Dan. per Theolog. Conv. Edit. an. 1651.

The Readers of the Lecture for the Art of Navigation at *Sivil* have published divers Treatises concerning Marine Causes, viz. Hieronymo de Chavez, Alonzo de Chavez, & Rodorigo Zamorano. (2) Consul. del mare.

Laws

Laws being grown somewhat Superannuated and obsolete, these *Laws* of *Oleron* succeeded the other, and were published in that Isle, then belonging to the Dutchy of *Aquitane*, by King *Richard* the First, at his Return from the *Holy Land*, in the Fifth Year of his Reign, the said Isle at that time being under the Dominion of the Kings of *England*.

As to the Original of the Sovereign Command at Sea in the Infancy of Time (though very uncertain) yet divers Nations, among which chiefly the *Affyrians*, *Macedonians*, *Persians*, *Egyptians*, *Romans*, and *Carthaginians*, have ascribed it to themselves; But the *Greeks* confidently assert, that *Minos* King of *Crete* had the first Sovereign Empire over the Sea, and thence would fain have it over our Faith also, as if *Saturn* King of *Crete*, seeing his Son *Neptune* to have invented the Art of Navigation, gave him the Command of his Navies at Sea, which he managed with such success, that after-Ages sacrificed to him as to a God of the Sea; So that *Minos* being descended of *Saturn* by his Son *Jupiter*, having afterwards obtained the Superintendency and Guard of the Seas, left it to his Successors. Notwithstanding which, the *Syrians*, *Egyptians*, *Cyprians*, *Rhodeans*, but specially the *Phœnicians*, have in all former Ages had the Honour of being reputed the most Valiant and Expert Artists at Sea in Maritime Affairs, and that from the excellent Conduct and Government



vernment of their Navies beyond all other Nations and Countries whatsoever. But the *Corinthians* are supposed to be the first that ever formed or modelled Navies at Sea in a Classical way. (a)

(a) Thucid.  
Libanius, cels.  
Rhod. 21. c. 3.

The *Athenians* had two chief Magistrates for the Maritime Affairs; The one was to provide such a number of Ships for this or that Design, each Captain having in charge to see to the Equipping of his own Vessel. These Captains they called *Trierarchy*. The other had power of setting them to Sea, and of ordering them home again at his pleasure, whom they called *Migistratus rei Nautica Jurisdictionem habens, qui Trierarchis jura reddebat*, and ordered the several Squadrons to such or such stations and places of *Rendezvous*, and discharged them as he thought fit. This was That *Thalassarchus*, or *Admiral* of the *Athenians*, (b) who sometimes had more *Admirals* then one at once, as *Niceas* and *Demosthenes*; as other times but one only, as *Alcibiades*, *Pericles*, *Simon*, and others. Likewise under *Alexander* the Great and his Successours, Kings of *Syria* and *Egypt*, there were divers *Admirals*, whereof some were *Grecians*; others of other Countries, such were *Nearchus*, *Onesicratus*, *Beton*, *Diognot*, and others; As also *Patroclus*, under *Nicanor* and *Seleucus* of the *Syrian* Monarchy; But most Memorable is that Commission which was by *Ptolomeus Philadelphus* given to *Decearchus*, as if he had been to take an exact

(b) Herod. 6.  
Thucid. 4. &  
Demosth. pro  
Ctesiph.

exact measure of the Circumference of the whole World by a Line of Navigation.

Among the *Phœnicians*, the *Syrians* and *Zidonians* were the most eminent in all Maritime Affairs, as was formerly hinted. These not only transported from place to place varieties of Merchandizes till then unknown to other parts of the World, but also made divers new Discoveries, and planted Colonies therein, as at *Utick*, *Hippone*, and *Lapte* in *Africa*; at *Thebes* in *Greece* and *Egypt*; and at *Gades* and *Carthage*, that *Carthage* which is in *Spain*; But of all *Africk*, the other *Carthage*, once Lord of the *Levant*, the chiefest for Sea-Affairs; whose *Admiral*, *Hanno*, by order of the Senate discovered the utmost Coasts of *Africk*, even to one degree of the *Æquinoctial*; And their other *Admiral*, *Hamilco*, discovered all that part of *Europe*, which till then lay as *sub-incognito* to the *Carthaginians*.

In the Eastern Empire he that was high *Admiral* was styled *Drungarius*, as *Drungarius Navigiorum Constantinopoli*; *Drungarius Classis*; *Drungarius mari Prefectus*; *Drungarius Magnus*. (c) Although some are of opinion that this was a general word with them, or a word which signified Generals as well by Land as by Sea, *Qui Drungis*, *hoc est*, *globis militum imperabant*. (d) This *Magnus Drungarius Classis* was a subordinate Officer or Naval Magistrate under their great Duke, (e) and was also styled *Ameralius*, which with them was

(c) Moris. Orb. Mar. l. 2. c. 5. ubi Zonar. Codinus, Buzelger. Imp. Rom. l. 4. c. 35.  
(d) Vopiscus. (e) Europalates in Official. Aulæ Constantin. vixit an. cir. 1059.

was likewise a Common Appellation for (f) Huntindon, qui sub Terrene Princes; Thus the Tyrant of Babylon was called *Admiratus*; (f) Thus Steph. Reg. 1148. floruit *Huntindon* speaks of twelve *Amiraios Paganorum*, that were slain at the Siege of Antioch. Thus *Matth. Paris*, in Will. 2. (g) Rupertus aliis Robertus speaks of 29 *Reges & Admiraios* at once, appointed for the Wars by *Corbaranus*. Monachus vixit, An. 1095. Thus *Robert* the Monk (g) makes mention Hist. sua de of the Son of *Cassianus* King of Antioch, Bello Saraceno, l. 4. and twelve *Admiraldi* of the King of Babylon slain in battel, whom with an Army These are the he had sent to aid the said King of Antioch. same twelve Thus the Agents or Ambassadors of the Amiralios mentioned by the King of Babylon styled the said King Huntindon. himself *Admiraldum*. (h.) *Dominus noster* (b) Robertus, *Admiraldus Babylonia*, mandat vobis Francorum Principibus Salutem. ibid. l. 5. in Thus *Nebuchodonosor* King of Babylon was styled *Admiratus*. (i) Thus we also find a Chieftain prin. & Turpinus Archiep. of a Bow-Militia, styled *Archubalistariorum* qui floruit an. 803. lib. de *Admiratus*. (k) So that anciently this Gest. Caroli Mag. cap. 17. word *Ameratus* or *Admiratus* did signifie [Si illud sit] says the Learned Sir H. Sp. as well the Commander in chief of the Armies by Land, as of the Navies by Sea, in his day, and and sometimes the Office or Dignity of we in ours. Kings and Princes or other Sovereigns of (i) Auth. Frag. Hist. Aquitan. Supreme Authority; but this you are to (k) Monstreletus. limit only to the *Turks* and *Asiaticks*.

Again, In the Eastern Empire there were no less than Four *Admirals*, or *Amirai*, (there properly so called) at once, for that *Mahomet*, or rather *Muhammad*, appointed Four *Prætors* in the Kingdom of

(l) Sigebert.  
in suis Chron.  
an 630. Chro.  
de Flandr. c.  
16. & 46.

(m) Theopha-  
nes. in Chro-  
nico, a Mour-  
fio citatus.

the *Sarazens* which were called *Amarei*. (l) And that *Muhamed* a little before his death constituted Four *Ameraos*, *qui debellarent omnes ex genere Arabum Christianos*. (m) These Four *Amerai* were also called *Quatuor Admirantes*. And of these Four *Admirals* with the *Sarazens*, the one had the Sea-Command of *Egypt* and *Africa*; two others thereof divided the *Spanish Coasts* betwixt them; and the Fourth had *Palestine* and the Coasts of *Syria*. But many are of opinion, that before *Charlemaigne*, the *Sarazens* had but one *Admiral*, viz. *Ad-dala*: after him *Aron*; and after him *Mabarmad*: which *Charlemaigne* having war with his Brother *Haldala*, and being more than half conquered by him, condescended that the *Sarazens* should have two *Admirals* for one. And *Turpin*, who was Secretary to the said Emperour *Charlemaigne*, acquaints us with an *Admiral* of *Babylon*, who came to the Succour and Relief of the *Sarazens* of *Spain* against the *French*; as also of another *Admiral*, viz. *Galaffre*, a very potent Favourite with the said Emperour. (n)

(n) Turpin.  
Hist. de Char-  
lemaigne, c.  
17. & 20.

Under the *Roman State*, when *Pompey* banded with *Cesar* for the Sovereignty, there were several *Admirals*, well nigh as many as the Nations were which aided either party with Shipping, as the *Egyptians*, *Asiaticks*, *Rhodeans*, *Syrians*, *Achaians*, and others, over whom *M. Bibulus* was Lord High Admiral. But when the Government

was

was reduced to an establishment, the Admiralty was settled also; which not long after was again divided into two parts, for there was one Admiralty at *Misene* and the adjacent Ports for the South; another at *Ravenna* towards the East; which two for distinctions sake they called the *High* and *Low* Seas; each whereof was under the Command of his proper *Admiral*, whom they called *Præfectus Classis*, as the Captains of their Ships were known by the style of *Navarchi*.

It is also evident, that in the *Roman* Empire there was anciently a Company or Society of Owners and Masters of Ships, as also of Merchant-Adventurers at Sea in the Isle and City of *Rhodes*, which above all other places in the World had once the Prerogative in deciding all Maritime Controversies; Infomuch that the Emperour *Antoninus*, who though Imperious enough in styling himself *Totius mundi Dominus*, yet in all Nautical Controversies subscribed to the *Rhodian* Law, acknowledging, that though himself was Lord of the World, yet the other was of the Sea. (o)

There were also very Ancient Laws made and published by those of *Rhodes*, who were most expert at Sea, as well touching Navigation, as Merchant-Affairs, where the use thereof was of no less Consequence unto, than of Antiquity in that *Mediterranean* Isle. (p)

The Assertions upon Historical Record touching the Excellency of their Sea-Laws,

(o) L. 9. De-  
precatio. Dig.  
AdLeg Rhod.  
de Jactu.

(p) C. Rho-  
dix, 2. Di-  
stinct.

(q) Aul. Gell.  
l. 7. Noct. At-  
tic. cap. 3. &  
Fred. Pruck-  
man in fest.  
Soluta Pote-  
stas, c. 3. nu.  
134. usque ad  
nu. 149. p. 186

their incomparable Skill in Navigation, and the Trophies of their Naval Victories are almost incredible. (q) But this so famous Isle being at length reduced from the Glory of a Splendid to the Eclipse of a Decayed Merchant, by reason of the many Irruptions and IncurSIONs made thereon by several Nations, specially by the *Turks*, a little before the Reign of *Charles the Great*, (when about the same time the *Turks* also possessed themselves of several other Isles in the *Mediterranean*) the Gallantry of the *Rhodian* Navies soon after vanished; which at length (as some *German* Authors would have it) was thence translated to the *Oriental* Ocean or *Baltick* Sea; For that *Wisby* in *Gotland* anciently prescribed the Sea-Laws to Merchants and Mariners; whereunto (as afterwards to *Lubeck*) the Neighbouring Cities did usually appeal in all Affairs of Maritime Cognizance.

The word *Admiralium* from the Eastern Empire was first transported into *Italy* and *Sicilia*, thence into *France*, and from thence into *England*. The first High Admiral in *France* (as supposed) was one *Kulandus*, so called by *Aginardus*, in the Life of *Charles the Great*; others called him *Rolandus*; he was Constituted High Admiral of *France* about the time of King *Pepin* or *Charles Martel*. (r) Yet others are of opinion, that the Office of *Ameral*, that is, *Admiral*, was known to the *French* first in the days of *Lewis the Seventh*, from whose time

Comes Maris.

(r) Morisot.  
Orb. Mar. l. 2.  
c. 7. in prin.

time, till *Philip* the Fourth, there was only one *Admiral*; After that, there were two *Admirals* in *France* at the same time. (s) (s) Idem l. 2. c. 9. in prin. And afterwards more than two at one and the same time, each dividing his Jurisdiction according to the Coasts of their several Provinces respectively. (t) This high Officer, *L' Amiral*, in point of Dignity, is next to the High Constable of *France*. Anciently there were three *Admirals* in *France*; one in *Aquitane*, another in *Brittany*, and the other was *Generalis in Francia*; which three are now reduced to one, who doth exercise his Jurisdiction at the *Marble Table* in *Palatio Parisiensi*. And whereas it is by some supposed, that *Rutlandus*, alias *Rolandus*, (as aforesaid) in King *Pepin's* days, was the first *Admiral* of *France*, yet the more probable opinion is, that either *Enguerrantus Dom. de Causy* in King *Philip* the Third's time; Or *Americus* Vicount of *Narbonne* in King *John's* time, was the first that ever had the honour of that high Office in the Kingdom of *France*. (t) Bernard. Girard. de Stat. & Successor. Gallie l. 4. 2. Calais. Admirallus seu Comes maris in Gallia, post Constabilem praefertur. An. cir. 1280, Ancir. 1356,

## CHAP. III.

*The Antiquity of the Maritime Authority, together with the Office and Jurisdiction of the Admiralty within this Kingdom of Great Britain.*

IN the precedent Chapter it is said, that the name of *Admirallus* first came out of the Eastern Empire into *Italy* and *Sicily*, thence into *France*, and thence into *England*; And this (as the Learned Sir *Henry Spelman* doth suppose) after the time of the *Holy War*. For that, as he observes out of *Hovenden*, when King *Rich. the First* prepared his Navy for that design, he appointed no single person to the Command in chief of that Navy by the name or style of Admiral, but deputed five several persons \* to that Command, by the name or style of *Ductores, Justiciarii, & Constabularii totius Navigii*. (a) The said Learned Authour comes something nigher to our times, and says, that this Appellation or style of *Admiral* seems not to be received with us in *An. 8 H. 3.* for that the King in his Grant at that time to *William de Lucy*, expresses himself only by the words of *Concessit Maritimam Anglia*, without any mentioning of the word *Admiral* in that Patent. Nor yet in the forty eighth year of his Reign, for that he then Constituted *Tho. de Moleton*,  
Capita-

\* Gerard. An-  
xienf. Archi-  
episcop. Ber-  
nard. Baon.  
Episc. Rob.  
de Sabul Ric.  
de Canvil  
Williel. de  
Forz de  
Ulerum (opi-  
natur) Ole-  
ron.  
(a) Spelm.  
Glos ex Ho-  
vendeno.  
Ann. 1264.



*Capitaneum & Custodem Maris* (non *Admirallium*;) So that he is of opinion, that this high Officer was not known to us here in England by the name or style of *Admirallus* till the beginning of *Edw. the First's* Reign. And that *William de Leiburn* was the first with us that had the dignity of that Office by the style of *Admiral*, who at the Assembly at *Bruges*, Anno 15 *Edw. 1.* was Ann. 1286. styled *Admirallus Maris Regis*. And that soon after the said Office became Tripartite, viz. Anno 22 *Ed. 1.* when the said *William* Ann. 1295. de *Leiburne* was made *Admiral* of *Portsmouth*, and the adjacent parts; *John de Botecurts* of *Tarmouth*, and the Neighbouring Coasts thereof; and a certain *Irish* Knight of the *West* and *Irish* Coasts. After whom succeeded three other *Admirals* for the same Divisions in the 19th Year of *Edw. 2.* Ann. 1325. viz. *John Otervin*, *Nicholas Kiriell*, and *John de Felton*. And in those days the *Admiral* was often styled not *Admirallus maris*, but *Admirallus flore Navium*, id est, *Classis*, or the *Admiral* of the *Navy*. And this *Admiral* had his Power divided into two stations; the one was the *North* station, which began at the mouth of the River of *Thames*, and thence extended it self *Northward*, comprising *Tarmouth* and all the *Eastern-shore*. The other was the *West* station, which beginning likewise at the mouth of the River of *Thames*, stretched it self *Westward*, comprising *Portsmouth*, and all the *South* and *West* of *England*. But the

first that was styled *Admirallus Anglia*, was *Richard* the younger, Son of *Alan* Earl of *Arundel* and *Surrey*. in the tenth year of R. 2. (b)

(b) Spelm.  
Glossar. verb.  
Admiralios.  
In temp. W. 1.  
Odo Admira-  
lius.

Ita Spelm.  
Gloss. De Ad-  
miralio G. l.  
An. 1142.

(c) Edessa, A  
Town in Meso-  
potamia, an-  
ciently called  
Antioch, one  
side of Eu-  
phrates. Edes-  
sa, Macedo-  
niae urbs in  
Æmathia Re-  
gione.  
Ortelii The-  
saur. Geogra.

Notwithstanding all this which hath been said, intimating that *William de Leiburn*, in the 15 of *Edw. 1.* was the first in *England* that had this Office by the name or style of *Admirallus*; yet it is evident by *Matth. Paris*, in *H. 1.* (which is about 150 years before that of *Ed. 1.*) that at that time there was mention made of one *Balac Ameral- lius* here in *England*, who in Fight took and surprized *Jocelyne* Earl of *Edessa*, (c) with his Cousin *Galerannus*. But at what point of Time precisely that Office by the style or Appellation of *Admiral* was first known in *England*, it matters not much, since the thing it self, which signified that Office now known to us by the style of *Lord High Ad- miral*, and the Jurisdiction thereof hath ever been in this Kingdom time out of mind; This will the more evidently ap- pear if you consult the Records of History, and compare them with others National, touching that Ancient Dominion the Kings of *England* have ever had over the Seas of *England*, together with that Maritime Ju- risdiction which hath ever asserted the same. That the Kings of *Great Britain* have an undoubted Right to the *Sovereignty* of the Seas of *Great Britain*, none but a few *Mare Libertines* (and that for their own In- terest) ever scuffled. Sir *Henry Spelman* gives us an Account of a very Ancient Re- cord

Seldeni Mar.  
Chius. seu de  
Domin. Maris,  
de Jurisdictio-  
nis Sovereignty of  
the Seas.

cord (d) extracted out of the Laws of (d) *Spelm.*  
*Hoelus Dha, Regis seu Principis Wallia, cir.* *Confil. p. 414.*  
*An. 928. which for the proof of the said* *Leges Ecclesi-*  
*Dominium quasi uno intuitu, is here inserted* *astice Hoeli*  
*in hac verba, viz.* *Dha (id est,*  
*Boni) Regis*

*'Variato aliquantulum Nominis Vocabulo,*  
*'dici hic videtur Huwell Da, qui superius*  
*'Hoel Dha, Latine Holéas & Hoelus, alias*  
*'Hwael, (quem Malmesburiensis unum fu-*  
*'isse refert e quinque Wallensium Regibus)* *An. 928.*  
*'Quos cum Cunadio Rege Scottorum, Mal-* *Malmesb. de*  
*'colmo Rege Cambrorum, & Maccusio* *Regib. 2. c. 3.*  
*'Archipirata (seu Principe Nantarum vel* *Marthusius*  
*'Marium Prefecto) ad Civitatem Legio-* *Archiparata*  
*'num sibi occurrentes, Rex Anglorum Ead-* *(id est, Prin-*  
*'garus in Triumpho pompam deducebat. Una* *ceps Nanta-*  
*'enim impositas, remigrare eos hanc coegit,* *rum) ita*  
*'dum in Prora ipse Sedens, Navis tenuit* *Spelm. Gloss.*  
*'bernaculum: ut se hoc spectaculo, Soli & Sali* *Rex Angliæ*  
*'orbis Britanici Dominum predicaret & Mo-* *Soli & Sali*  
*'narcham.* *Orbis Brita-*  
*nici Dominus.*

In this Ancient and Memorable Record, King *Edgar*, Neptune-like, rides in Triumph over the *British Seas*, giving the World to understand, that *Dominum Maris*, is the *Motto* of his *Trident*. Consonant whereunto is that which the Law it self says, (e) *Mare dicitur esse de districtu illius Civitatis vel Locis, qui confinat cum mari, in quantum se extendit territorium terre prope mare.* In a word, to this purpose the Renowned Learned Mr. *Selden*, who hath left no more to say, but with *Jo. Baptist Larrea* in one of his Decisions of *Granada*, That  
*Autho-*

(e) *Bald. Con-*  
*fil. 51. & Tuck-*  
*Concl. 87.*  
*verb. mare.*

(f) Larrea  
Decis. Gra-  
nat. Disp. 4.  
nu. 32. & Leg.  
unic. sect. sed  
neque cod. de  
ver. jur. enu-  
cleando.

*Authorum sententias non ex numero, sed ex ratione metiri oportet: & pensari debent juris fundamenta, non Authorum Elenchum velut calculatione computari. (f)*

(g) Terms of  
Law, verb.  
Admiral.

(b) Ibi l.

(i) Coke part  
1. Inst. l. 1.  
c. 1. Sect. 3.  
& l. 3. c. 7.  
Sect. 439.

The Lord High Admiral is by the Prince concredited with the management of all Marine Affairs, as well in respect of Jurisdiction as Protection. He is that high Officer or Magistrate to whom is committed the Government of the Kings Navy, with power of Decision in all Causes Maritime as well Civil as Criminal; So that beside the power of Jurisdiction in Criminals, he may judge of Contracts between Party and Party, touching things done upon or beyond the Seas. (g) Wherein he may cause his Arrests, Monitions, and other Decrees of Court to be served upon the Land, as also may take the Parties Body or Goods in execution upon the Land. (h) The Lord Coke, in honour of the Admiralty of England, is pleased to publish to the World, that the Lord Admirals Jurisdiction is very Ancient, and long before the Reign of Edw. 3. and that there hath ever been an Admiral, time out of mind, as appears not only by the Laws of Oleron, but also by many other Ancient Records in the Reigns of Hen. 3. Edw. 1. & Edw. 2. (i) Thus as the Laws and Constitutions of the Sea are nigh as Ancient as Navigation it self, so the Jurisdiction thereof hath universally been owned and received by all Nations; yea, and this Kingdom is by way of Eminency

nency Crowned by Antiquity for the promulgation of the one, and establishment of the other. For, otherwise without such Maritime Laws, and such an *Admiral Jurisdiction*, how could the Ancient *Britains*, long before *Julius Caesar* invaded this Isle, restrain all Strangers (Merchants excepted) from approaching their Confines, (k) or regulate such Navies as were the wonder of that Age? (l) Or, how could King *Edgar* in the Titles of his Charters have effectually styled himself as well *Imperator Dominusque rerum omnium Insularum Oceanique Britanniam circumjacent*, as *Anglorum Basileus*, (m) or maintain in Naval Discipline these four hundred Sail of Ships appointed by him to guard and scour the *British Seas*? (n) And did not *Etheldred* after *Edgar* for the self-same end and purpose set forth to Sea from *Sandwich* one of the greatest Navies that ever this Kingdom prepared? Doubtless this was no Lawless Navy, without Maritime Constitutions for the due regulation thereof according to the Laws of the Sea, Consonant to that of the Jurisdiction of the Admiralty then in use and received by all the Maritime Principalities of *Europe*.

Whereas it is universally acknowledged, That the Admiralty of *England* is very Ancient, and long before the Reign of *Edward* the Third, who ever consults Antiquity shall find it far more Ancient, and long before the Reign of *Edward* the First; even

(k) *Cæf. Com. de Bel. Gall. l. 4. fo. 72.*  
(l) *Ibid. l. 3. fo. 53.*

(m) *Ex Charta fundationis Ecclesie Cathed. Wigor. cit. per Sir Tho. Borroughs in his Sovereignty of the British Seas. p. 21.*  
(n) *Ranulph. Cestrensis.*

In Temp. H. 3  
*Rich. de Lucy*  
*had maritimam Angliæ,*  
& *Tho. Moleton was Capit.*  
& *Custos*  
*Maris.*  
*Spelm. Gloss.*

Record in the  
Tower of Lon-  
don.

even time out of mind before the said *Edward the First*. To this purpose very remarkable is that ancient Record in the Tower of London, entituled, *De Superioritate Maris Anglia & jure Officii Admirallatus in eodem*, and out of the old French rendred into English by Sir John Borroughs in his compendious Treatise of the *Soveraignty of the British Seas*, pag. 25, &c. edit. Anno 1633. in which it evidently appears, that the Admiralty of England, and the Jurisdiction thereof was far more Ancient than *Edward the First*, and that from Age to Age successively, and time out of mind even before the days of the said *Edward the First*, it was so owned and acknowledged by this and all other Neighbour-Nations, as appears by the said Record, which was occasioned by a National Agreement of certain Differences arising between the Kings of England and France, in the 26th Year of the Reign of the said *Edward the First*, by reason of certain usurpations attempted by *Reyner Grimbald*, then Admiral of the French Navy in the British Seas; in which Agreement the Commissioners or Agents for the Maritime Coasts of the greatest part of the Christian World, of Genoa, Spain, Germany, Holland, Zealand, Freeczland, Denmark, and Norway, then present, made this memorable Acknowledgment and Declaration, which is extracted out of the said Record, as to so much thereof as relates to the Jurisdiction of the Admiralty,

miralty, viz. That the Procurators of the Admiral of the Sea of England, and of other places as of the Sea-Coasts, as of Genoa, Catalonia, Spain, Almayne, Zealand, Holland, Freezland, Denmark, and Norway, do shew that the Kings of England, time out of mind, have been in peaceable possession of the Seas of England, in making and establishing Laws and Statutes and Restraints of Arms and of Ships, &c. and in taking Surety, &c. and in ordering of all other things necessary for the maintaining of Peace, Right, and Equity, &c. and in doing Justice, Right, and Law, according to the said Laws, Ordinantes, and Restraints, and in all other things which may appertain to the Exercise of Sovereign Dominion in the places aforesaid. And A. de B. Admiral of the Sea deputed by the King of England, and all other Admirals ordained by the said King of England have been in peaceable possession of the Sovereign guard, with the Cognizance of Justice, &c. And whereas the Masters of the Ships of the said Kingdom of England in the absence of the said Admirable have been in peaceable possession of taking Cognizance and judging all Actions done in the said Sea, &c. the said Procurators, in the Names of their said Lords, do pray, &c. that speedy delivery of the Goods and Merchandizes taken and detained, be made to the Admiral of the said King of England, to whom the Cognizance of the same of right appertaineth, so that without disturbance

disturbance of you or any other he may take Cognizance thereof, and do that which appertaineth to his Office. In which Record it is observable, that even in those days, that is, before the time of Edward the First, the Kingdom of England had not only the Sovereignty of the British Seas, but also an Admiral empowered with a Jurisdiction Maritime to take Cognizance and Judge all Actions done on the Sea; to do Justice, execute the Laws of the Sea, maintain Peace, Right and Equity, according to the Laws and Ordinances of the Sea; and in a word, to minister Justice in all things that to the Office of an Admiral appertain. To this might be added King John's Ordinance made at *Hastings*, touching the Sovereignty of the British Seas in the point of striking Sail or veiling Bonnets by the Vessels of Foreign Nations to the Kings Ships; which Ordinance was made long before the Reign of Edward the First, and wherein mention is likewise made of the High Admiral of England; But this that hath been said, may abundantly suffice both to prove and illustrate the Antiquity of the High Admiral of England, and his Jurisdiction in matters Maritime.

If it be granted, that *Frustra sunt Arma foris, nisi est Consilium domi*, it cannot well be denied but that *Frustra sunt Arma domi nisi est Dominium Maris*, to which as undeniably may be added, that *Frustra est Dominium Maris, nisi est Jurisdictio domi*.

IF



If therefore the Ancient Rights of the Jurisdiction of the Admiralty of *England*, should at any time happen to be impeded by ought, not so properly qualified Judicially to conserve the Rights of the Sovereignty of the *British* Seas, might not a Decay of Trade, that *Coronncope* of all National Provisions, be justly suspected? specially if Neighbour-Nations should thence pretend to spy any thing like a flaw in *England's* Trident, as if her *Dominium Maris* were in part dismantled; the *Plenty* as well as the *Safety* and *Security* of these Kingdoms, much (under God) consisting in the Power of the Royal Navy; those *Pyramids* of *Majesty*, or *Floating Garisons*. The *Dominium & Jurisdictio Maris* are such Confederates, you cannot prejudice the one, and not the other; And therefore to scruple that Jurisdiction, those Ancient Rights, whereby our own are conserved and secured, may not be convenient; So that to doubt whether the Established Jurisdiction of the High Admiralty of *England* may judge of Marine Properties, is implicitly and in effect to inferr, that the Navy Royal is equipped only to enamel the Seas and take the Air, or that their Captures at Sea must evaporate; if Bargains and Sales made *super altum mare* can transfer and alienate Properties, then doubtless the Admiralty can finally Judge and Determine thereof. Nor let any man think the Admiralty of *England* is without remedy, in case  
one

Jurisdictionem cujusvis Judicis impediens ab eo puniri potest, & coerceri. licet ejus subditi non sint.

Bart. & Alex. in L. Omnibus. Sect. is videtur. D. Si quis jus dic. non obtemp. & Larrea. Decif. Gran. Disput. 1. nu. 13.

Jurisdictione concessa, censetur concessum Imperium missum, h.e. potestas Exequendi. Quoniam ea concessa, censetur etiam tradita ea sine quibus Exerceri non potest.

Carlo de Legib. lib. n. Disp. 10. pag. 503. Lit. c.

Where the Place is the Foundation, it is more than a bare Circumstance.

commander Commissioned to fight with his hands manacled behind him; *Sententia absque Executione, est quasi splendidum Justitia Cadaver*. This mis-conceit may not be much inferiour to theirs who are dextrous at Translocations by surmises and suggestions; if the circumstance of Locality be too light to be traversable, yet it is

one man impleads another for an *Admiral* cause in another Jurisdiction; for if the Admiralty cannot summon and proceed according to the ancient style, practice and known Rights, Laws and Customs of that Jurisdiction, against such who in matters of Admiral Cognizance prosecute the Law elsewhere, then what is it more than a meer *Idea* that hath no real existence beyond the pleasure of the parties litigant; nor is that other mis-opinion, viz. (That the Admiralty may not enforce its own Decrees and Orders) worth Consideration; for the Executive part is so inherent in a Jurisdiction, *quatenus* such, that in effect it is but a lame and imperfect Jurisdiction without a Power Coercive, which breaths life and vigour into a Jurisdiction by Execution, which otherwise would be but like a Body without a Soul, or like an expert Com-

is of weight enough to be surmised or suggested. It is not impossible but that the Cognizance of the Admiralty, being in part essentiated by the Marine Circumstance of Place, may be obstructed by a meer mis-surmise as to the Locality. *Suum cuiq; tribuere* is the ultimate Result or *Summa Totalis* of all Justice, whose Ballance is then best poised, when it weighs each Individuals, Policy with a Consistency to common Interest. It may be not less hazardous than chargeable for the Client to complement *Justinian* with one Fee, and *Littleton* with another; If so, it will be expedient that he provide two Purfes, which is but the beginning of Sorrows, for he must also provide a good stock of Patience to await the Event of what will put no issue to the merits of his Cause. And in Concurrencies of Jurisdictions a Concurrence of Jurisdictional Qualifications, as well *Intrinsic*, as *Extrinsic*, seems to be requisite; for, admitting that by a *Dedimus potestatem*, or other Writ of like nature, Witnesses might be Legally examined at *Venice*, *Lisbon*, or other transmarine parts; *Sub mutua vicissitudinis obtentu*, yet what Judicial improvement can be made thereof, especially *quando ex facto jus oritur*, without due *intrinsic* qualifications calculated for the *Mediterranean* of a Maritime Cause. But to digress, may be to transgress; To return therefore to the Antiquity of the Office and Jurisdiction Admiral.

*It may not be hence imagined but that it is as legal or common Law to surmise in a Declaration an act possibly done at Sea to be indeed done at Land: As at the Admiralty, to alledge in a libel an act possibly done at Land, to be indeed done at Sea, vel infra Jurisdictionem maritimam.*

*A Concurrence of Jurisdiction seems to imply a Divisibility thereof. But Jurisdictio est quid Incorporale, nec divisionem recipit nec patitur. Dur. Spec. l. 4. de præscript. nu. 22.*

The Author of the Book, entituled, *Rights of the Kingdom*, hath several Passages concerning the Office and Jurisdiction of the Admiralty, whereof one is (pag. 90.) That *Edgar*, that Great Monarch, was as great a Conquerour by Sea, as *Aethelstane* by Land; That it might be easier to shew his four Seas, than to set their exact Bounds. But in (pag. 132.) he is pleas'd to say, that the Law Maritime is *Dark* enough, with all the Jurisdiction of the Court Admiral; (So is the Sun to him that *will* not see) where he farther seems to please himself with saying, That that Office may be harder than the Name, by calling it a strange mixture of *Greek* and *Arabick*. Yet for the Antiquity of the said Office, he doth the Admiralty that right, as withal in the same place to assert, That the old *Ms. del' Office del' Admiral* hath divers Records of *H. 1. Rich. 1.* and King *John*, speaking of Tryals by twelve, (as at Common Law) But that now the practice is much otherwise. And that in the Rolls of *Edw. 1.* the Name of Admiral: But not in our Printed Laws (that the said Author knows of) till *Edward the Second*. And then adds, That in *Edward the Third*, the Rolls are full of that Office. And so proceeds, That in *Rich. 2.* it was brought to a Weldy (that's the Epeithite it pleases him to afford it) Model. Being *Uncertain* rather than *Infinite* before, as the said Author is there pleased to determine; For (says he) the Bounds were ever

ever straighter much, than some may imagine. Also that they were again disputed in *Henry the Fourth*, *Queen Elizabeth*, and *King James*. And then he is pleas'd most facetiously to add, That it lies more open to the *Common Law*, than to the *Wind*. Yet withal he doth not there conceal, but that besides the Laws of *Arthur the Britain*, and *Edgar the Saxon*, we have some Records of Custom by Sea as well as by Land; with Priviledge to some, below the King, before the *Norman*: whom they make the *Founder*, yet he was (in the said Authour's judgment) but *Patron* of the *Ports*, and *Wardens* of the Sea. And the same Authour, speaking of the Sea-statutes of *Rich. 1.* how that they were made, *de Communi probarum virorum Consilio*, refers to the very expression of the Charter it self; in *Hovenden*, *Wendover*, or *Matthew Paris*, who doth add, that *per Consilium Magnatum*, there were made *Iusticiarii super totum Navigium Anglia*; &c. which with divers Records of *Henry the Third* may be added to the *Admiral*: or *Saxon*, *Ann Mere eal*, *Over all the Sea*. To which much might be added from the Rolls of *Hen. 3.* and *Ed. 1.* But this that hath been said, may suffice to satisfy some and convince others, touching the Antiquity of the Office and Jurisdiction of the High Admiralty of *England*.

For the *Utility* of this Ancient Jurisdiction of the Admiralty in this Kingdom of

Great Britain, if you have retrospect to the Honour thereof in Precedent Generations, Antiquity can witness with what effectual success (if not to the *nonplus* of Neighbour-Nations) the *Dominium Maris Britanici* hath been from Age to Age judicially asserted; If you consider the plenty and splendour of a flourishing Kingdom, the present Generation cannot yet forget to give ample Testimony thereof in reference to the Trade and Commerce of this Nation; And if you will not be so irregular as to deny the Consequence that naturally flows from these Premises, you cannot but infer this Positive Conclusion, That the succeeding Generations are like to suffer as well an Eclipse of their Honour, as an Abatement of Interest, without the influence of that Jurisdiction; In-

Car. Richlieu. somuch as the late Cardinal (save one) of France did wisely (according to the last cited Author) dispose, or rather retain that Office, as the best Jewel of that Kingdom, which yet must yield to this. But in a word, the Jurisdiction of the Admiralty of England may not unaptly be compared to that Tree in the Island of Fierro, being one of the *Sept. insula* of the *Canaries*, which as *Historians* tell us, doth with the droppings of his leaves yield water for the sustenance of the whole Island: It is farther added, that the *Moors* having taken that Island from the *Christians*, attempted to fell down that Tree, but each blow recoyled on the striker.

Purch.

striker. The former part of this strange Relation with a small variation passes for a Truth, as known unto and acknowledged by most of the Ancient Travellers and Geographers; The other part being probably but a fabulous Addition, *To keep hands off*, has not (as the other) the Credit of an Application. To conclude, If this Chapter seems to a *Genius* more ratified by acuteness for Apprehension, than endued with Patience for Expectation, more prolix than may be regularly consistent with a Treatise only by way of Summary View, let him only consider, that where Eagle-eyes, who are seldom dazeled with too much light, are to be dealt with, it may be less disingenious to borrow a Point of Expatriation, than to remain too much in debt to the Truth for want of room to display her Beams in.

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## C H A P. IV.

*Of Persons Maritime; As also, of such Things as are properly Cognizable within the Jurisdiction of the Admiralty of England; And in what method it proceeds to Judgment.*

There are but three things that seem specially to illustrate the splendour of a Jurisdiction, viz. *Sceptrum Majestatis*, or  
D 3 the

the Power and Legal Authority of the Prince, as to the Constitution thereof; *Codex Administrationis*, or the Right Administration of Justice; and *Gladii potestas, vel Gladius Executionis*, or the Coercive Power. (a) That Jurisdictions thus constituted are *inter Regalia Principum*, no person not dis-principled will deny; So as what was long since the Law as to the *Emperour* in point of Jurisdiction within the Empire, *Imperator quoad Jurisdictionalia Dominus totius mundi appellatur*, (b) is the same and as true in absolute Kings and Princes within their own Kingdoms, Dominions, Principalities and Territories; And no wonder, in that Kings and Princes *tantum possunt in suo statu, quantum Imperator in Imperio*. (c) Some without lipping say, that a King in his Kingdom hath a far greater right and interest, than the Emperor hath in the Empire; for that a King is *Loco Domini*, and his Kingdom is more assimilated unto and hath a greater resemblance with that which is *Dominium*, properly so called, than with that which is but simply *Regimen*. (d) The Emperor is not *Proprietarius*, but chief Governour of the Empire; (e) And that only by Election, not by Succession as the other. (f) Now as the Seas belong to Princes in respect of Jurisdiction and Protection; (g) So also in them properly resides the Right and Power of Commissionating Ministers of Justice for the due Exercise and Administration thereof, in decision of all matters, whether

(a) Peregrin. de jur. Fisc. lib. 1. tit. 1. nu. 10.

(b) L. Deprecatio, Dig. ad Leg. Rhod. de Jact.

(c) Bart. in L. 1 Par. de qua re, D de Postul. & in L. infamem. D. de Publick. Judic.

(d) Bald. Confil. 271. n. m. 3.

(e) Ibid. Confil. 327. nu. 7.

(f) Andr. Iter. & Afflic. in cap. 1. de Vassal. decrept. & rat.

(g) Jason Jac. de Arc. & Bald. in l. 2 ff. de Rei. Davis



whether Civil or Criminal within their Cognizance, according to the known Laws of the Sea, not contradicting the Statute or Municipal Laws of that Kingdom or State, whereof the said Prince is, next and immediately under God, Supreme. (b)

As to *Persons* Maritime, it might be considered who they are that more peculiarly are of Marine Capacities, and properly may be said to be within the Jurisdiction of the Admiralty; what their Rights, Privileges and Immunities are; and what their Office or Duty respectively is; Likewise as to *Things* properly Maritime, it might be considered either as they be in respect of the actions thence arising, *Civile*, and respecting only *Commodum Privatum*, between party and party, whether it be *Contractus* or *quasi Contractus*, either by any Perpetual known Rights, or by some Casual Occurrence; Or *Criminal*, and respecting the *Fiscus* in reference *ad militatam Publicam*; but that the design of this Treatise is not to expatiate in the Law on any of these, but only (as most adequate to a Summary View of the Admiral Jurisdiction) to touch, *quasi in transitu*, what refers to each of these under its own proper head, and no farther than may be of use for the clearer discovery of the subject matter of the Jurisdiction of the Admiralty of *England*; without engaging into Controversial points; chusing rather in a Treatise so compendious to be wind bound

(b) Glos. in  
verb. Crimi-  
nalibus, in tit.  
de pace. Con-  
stan. Bald. in  
Auth. Cassa.  
Cod. de Sacr.  
Sanct. Eccl.  
Alex. Conf. 8.  
col. 1. Cagnol.  
in L. 2. de O-  
rig. jur. nu. 190

in our own Ports, than to lanch forth into the wide Ocean of the Maritime Laws touching this Subject, specially in an *English* Bottom, having an eye to the Burden of the Vessel, and for whose account this *Cargo* was first shipp'd, whither bound, and for whom consign'd; as also how disadvantageous it might prove for the *Principals* to have the returns of their expectation only in the Arbitrary altercations of cross-opinions, rather than in such staple-truths of the Law as are not only currant in all the Navigable Parts of the World, but of most use and practice in the Admiralty of *England*. For these Reasons the Reader may expect only a taste of *Admiral* varieties, and therein no more than may serve to excite his impatience after the excellency of that which in a set Treatise for this purpose might in its proper Dialect and due Latitude be emitted by an abler Artist.

All Maritime Affairs are regulated chiefly by the *Imperial* Laws, the *Rhodian* Laws, the Laws of *Oleron*, or by certain peculiar and Municipal Laws and Constitutions appropriated to certain Cities, Towns and Countries bordering on the Sea, within or without the *Mediterranean*, calculated for their proper Meridian; or by those Maritime Customs and Prescriptions or Perpetual Rights which are between Merchants and Mariners, each with other, or each among themselves. This Maritime Government

vernment and Jurisdiction is by the King as Supreme, as well by Sea as at Land, concredited with the Lord High Admiral of *England*, who next and immediately under the Prince hath the chief Command at Sea, and of Sea-Affairs at Land. This Lord High Admiral hath several Officers under him, some of a higher, others of a lower form; some at Land, others at Sea; some of a Military, others of a Civil Capacity; some Judicial, others Ministerial. Such as are Chief in the Judicial Capacity are in the Law known by the style of *Magisteriani*, *Li Consoli del mare*. or Judges of Sea-faring Debates and all Maritime Controversies; whereof one being the *Judex ad quem* in all Maritime Causes of Appeal from Inferiour Courts of Admiralty, is with us known by the style of *Suprema Curia Admirallitatis Angliae Judex*; within whose cognizance in right of the Jurisdiction of the Admiralty by the Sea-Laws, the Laws and Customs of the Admiralty of *England*, are comprized all matters properly Maritime or any way pertaining to Navigation. The Judicial Proceedings wherein are Summary, *Velo Levato*, & *sine figura Judicii*. As by Warrant of Arrest or other Original Mandate; Execution and Return thereof; Interposition of Caution given by the arrested for his Legal Appearance according to the tenor of the said Warrant of Arrest; Appearance and Introduction of Sureties by way of Stipulation or Judicial Recognizance in

in the summ of the Action, *de judicio sisti, de judicato & expensis solvendis, cum rati-  
habitione Procuratorii*; as also the Plaintiffs  
caution to pay Costs in case he fail in his  
Suit; Contempt in case of Non-appearance,  
and Forfeiture of the said Caution in case  
of such Contempt; offering the Libel in  
case of Appearance; *Litis contestation* or  
joyning of issue; Decree for the Defen-  
dants personal Answer upon Oath to the  
said Libel exhibited against him; a Decree  
for a *viis & modis* in case of a *Non Inven-  
tum*; a Decree against the Sureties to pro-  
duce the party Principal *in judicio*; Pro-  
duction of him accordingly; his Answer  
upon Oath to the Libel; Production of  
Witnesses; Compulsory against such Wit-  
nesses as will not appear without it; Com-  
mission for examining of Witnesses at  
home, or *sub mutua vicissitudine obtentu*  
beyond Sea; The Oath of Calumny by  
both Parties, if they please; Exception  
against the Witnesses; The Supplementary  
Oath; Exhibition of Instruments; Pub-  
lication of Witnesses; Conclusion of the  
Cause; Sentence Definitive; Appeal made  
within fifteen days of the said Sentence;  
Assignment *ad prosequendum*, Prosecution  
of the Appeal; Remission of the Cause  
to the Judge *A Quo*; Decree for Execu-  
tion; and Sentence executed accordingly.  
Beside the other way of proceeding by Ar-  
rest of Goods, or of Goods in other mens  
hand, and so to a *Primum Decretum* (as

Ten days by the  
Law.  
Fifteen days by  
the Stat.

to the Possession) upon four Defaults; and thence (after one year) to a *Secundum Decretum* (as to the Propriety) in case of *Non-intervention* (upon laying down the cost of the *Prim. Decret.*) in the interim. In the Proceedings there may be also *Reconvention*, also sequestration of Goods *lite pendente*; and sentence *Interlocutory*, as well as *Definitive*; with many other particulars which may or may not happen, according as the Court sees cause and the merits of the Case require.

Within the Cognizance of this Jurisdiction are all Affairs that peculiarly concern the Lord High Admiral, or any of his Officers *quatenus* such; all Matters immediately relating to the Navies of the Kingdom, the Vessels of Trade, and the Owners thereof, as such; all Affairs relating to Mariners, whether Ship-Officers or Common Mariners, their Rights and Priviledges respectively; their Office and Duty; their Wages; their Offences, whether by Wilfulness, Casualty, Ignorance, Negligence, or Insufficiency, with their Punishments. Also all Affairs of Commanders at Sea, and their Under-Officers, with their respective Duties, Priviledges, Immunities, Offences, and Punishments. In like manner all Matters that concern Owners and Proprietors of Ships, as such; and all Masters, Pilots, Steersmen, Boatswains, and other Ship-Officers; all Ship-wrights, Fisher-men, Ferry-men, and the like; Also all Causes of Seizures and Captures,

Captures made at Sea, whether *jure Belli Publici*, or *jure Belli Privati* by way of Reprizals, or *jure nullo* by way of Piracy; Also all Charter-Parties, Cocquets, Bills of Lading, Sea-Commissions, Letters of Safe Conduct, Factories, Invoyses, Skippers Rolls, Inventories, and other Ship-Papers; Also all causes of Freight, Mariners Wages, Load-manage, Port-charges, Pilotage, Anchorage, and the like; Also all causes of Maritime Contracts indeed, or as it were Contracts, whether upon or beyond the Seas; all causes of Money lent to Sea or upon the Sea, called *Fœnus Nauticum*, *Pecunia trajectitia*, *usura maritima*, *Bomary-Money*, the Gross Adventure, and the like; all causes of Pawning, Hypothecating, or Pledging of the Ship it self, or any part thereof, or her Lading, or other things at Sea; all causes of *Factus*, or casting Goods over-board; and Contributions either for Redemption of Ship or Lading, in case of Seizure by Enemies or Pyrats, or in case of Goods damnified, or disburdening of Ships, or other chances, with Average; also all causes of Spoil and Depredations at Sea, Robberies and Pyracies; also all causes of Naval Confort-Ships, whether in War or Peace; Ensurance, Mandates, Procurations, Payments, Acceptilations, Discharges, Loans or Oppignorations, Emptions, Venditions, Conventions, taking or letting to Freight, Exchanges, Partnership, Factoridge, Passage-Money, and whatever is of Maritime nature, either

either by way of *Navigation* upon the Sea; or of *Negotiation* at or beyond the Sea in the way of Marine Trade and Commerce; also the Nautical Right which Maritime Persons have in Ships, their Apparel, Tackle, Furniture, Lading, and all things pertaining to Navigation; also all causes of Out-readers, or Out-riggers, Furnishers, Hirers, Freighters, Owners, Part-owners of Ships, as such; also all causes of Priviledged Ships, or Vessels, in his Majesties Service, or his Letters of *Safe Conduct*; also all causes of Shipwrack at Sea, Flotson, Jetson, Lagon, Waiffs, Deodands, Treasure-Trove, Fishes-Royal; with the Lord Admirals shares, and the Finders respectively; also all causes touching Maritime Offences or Misdemeanours, such as cutting the Bovy-Rope or Cable, removal of an Anchor whereby any Vessel is moored, the breaking the Lord Admiral's Arrests made either upon Person, Ship, or Goods; Breaking Arrests on Ships for the King's Service, being punishable with Confiscation, by the Ordinance made at *Grimby*, in the time of *Rich. 1.* Mariners absenting themselves from the Kings Service, after their being prest. Impleading upon a Maritime Contract or in a Maritime Cause elsewhere than in the Admiralty, contrary to the Ordinance made at *Hastings* by *Ed. 1.* and contrary to the Laws and Customs of the Admiralty of *England*; Fore-stal-ling of Corn, Fish, &c. on Ship-board, re-grating,

*Whales, Star-  
gous, Porpoi-  
ses, Ballines,  
Dolphins, and  
all Fishes strange  
for bulk, rarity,  
or quality, are  
called Fishes  
Royal, and be-  
long to the  
King.*

grating, and exaction of Water-Officers; the appropriating the benefit of Salt-waters to private use exclusively to others without his Majesties License; Kiddles, Wears, Blind-Stakes, Water-Mills, and the like, to the Obstruction of Navigation in great Rivers; False Weights or Measures on Ship-board; Concealings of Goods found about the Dead within the Admiral Jurisdiction, or of Flotsons, Jetsons, Lagons, Waiffs, Deodands, *Fishes Royal*, or other things wherein the Kings Majesty or his Lord Admiral have interest; Excessive Wages claimed by Ship-wrights, Mariners, &c. Maintainers, Abettors, Receivers, Concealers, or Comforters of Pyrats; Transporting Prohibited Goods without License; Draggers of Oysters and Muscles at unseasonable times, *viz.* between May-day, and Holy-rood-day; Destroyers of the Brood or Young Fry of Fish; such as claim Wreck to the prejudice of the King or Lord Admiral; such as unduly claim Priviledges in a Port; Disturbers of the Admiral Officers in execution of the Court-Decrees; Water-Bayliffs and Searchers not doing their Duty; Corruption in any of the Admiral-Court-Officers; Importers of unwholsome Victuals to the Peoples prejudice; Freighters of strangers Vessels contrary to the Law; Transporters of Prisoners or other prohibited persons not having Letters of safe Conduct from the King or his Lord Admiral; Casters of Ballasts into Ports



Ports or Harbours, to the prejudice thereof; Unskilful Pilots, whereby Ship or Man perish; Unlawful Nets, or other prohibited Engines for Fish; Disobeying of Embargo's, or going to Sea contrary to the Prince his Command, or against the Law; Furnishing the Ships of Enemies, or the Enemy with Ships; All prejudice done to the Banks of Navigable Rivers, or to Docks, Wharffs, Keys, or any thing whereby Shipping may be endangered, Navigation obstructed, or Trade by Sea impeded; Also embezzlements of Ship-tackle or Furniture; all substractions of Mariners Wages; all defraudings of his Majesties Customs or other Duties at Sea; also all Prejudices done to or by Passengers a Shipboard; and all Damages done by one Ship or Vessel to another; also to go to Sea in tempestuous weather, to sail in devious places, or among Enemies, Pyrats, Rocks, or other dangerous places, being not necessitated thereto; all Clandestine Attempts by making privy Cork-holes in the Vessel, or otherwise, with intent to destroy or endanger the Ship; Also the shewing of false Lights by Night, either on Shore or in Fishing Vessels, or the like, on purpose to intice Sailers, to the hazard of their Vessels; all wilful or purposed entertaining of unskilful Masters, Pilots or Mariners, or sailing without a Pilot, or in Leaky and insufficient Vessels; also the over-burdening the Ship above her Birth-mark, and all  
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ill stowage of Goods a shipboard ; also all Importation of *Contrabanda* Goods, or Exportation of Goods to prohibited Ports, or the places not designed ; together with very many other things relating either to the state or condition of persons Maritime, their Rights, their Duties, or their Defaults ; all which only to enumerate would require a Volume of it self ; These therefore may suffice for a hint of Persons and Things properly Cognizable within the Jurisdiction of the Admiralty of *England* ; Omitting what might be here likewise added as to the Naval Military part within the Cognizance of the said Jurisdiction ; As that Ships in the *British* Seas not amaining at the first Summons to any of his Majesties Ships, may be assaulted and taken as Enemies ; That no Prize ought to be carried from the Fleet without the Admirals leave ; That all above Hatches, saving the Ship-Furniture, ought upon a seizure *jure belli* to go to the Captors ; That the Vessels of Forraigners met with at Sea, may be visited and examined, if suspected, specially in times of War, their Cocquets, Passports, Charter-parties, Invoyses, Bills of Lading, Ship-Roll, with other Instruments and Ship-Papers perused, that so, if there be cause, they may be brought before the Admiral.

There are many other particulars, referring as well to the Civil as to the Criminal part of this Jurisdiction, which might be here inserted ; but the design of this Compendious

pendious Treatise being (as formerly hinted) rather to *touch* than *handle* things, it may not be expected that the great *Continent* of the *Admiralty* should be comprized into so small a Map. To conclude therefore with that great Oracle of the Civil Law, *Baldus*, touching the Marine Jurisdiction. *In mari Jurisdictio est, sicut inter-ra. Nam Mare in terra (h. e.) in alveo suo fundatum est, quum Terra sit inferior Sphæra: & videmus de jure Gentium, in mari esse Regna distincta sicut in arida terra: Ergo & Jus Civile (id est) Prescriptio illud idem potest (in mari scilicet quod in terra) operari.* So that all such, as out of a subtle humour would fain insinuate into the World, as if there were no such thing as *Jurisdictio maris*, or *Dominium maris*, with its prescript limits and bounds (some arguing from the perpetual motion of that liquid element; Others, from a supposed parity between the Sea and the Air in point of Community) are by this Learned Oracle left without any hopes or possibility of the least Orthodox support for their *Anti-thalas-monarchical* opinion; For in this place he is positive, That both the Jurisdiction and the Dominion of the Sea, with their distinct limits and bounds, as well as that of the Land, are duly constituted, and that not by force and power, but by Law, not only by the Civil, but also by the Law of Nations; and this not in the Emperours alone, but also in

Baldus Leg. 2  
De. de Rer.  
D. vis.

such Kingdoms and States as by Prescription, Custom, or otherwise may claim the same.

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## CHAP. V.

*Of Laws and Jurisdictions in general; with the several kinds and degrees thereof.*

IT is recorded in the Historical part of the Law, by that famous Lawyer of *Mil-laym*, *Jason Mynnus*, (who flourished about the year of our Lord 1500, and taught at *Padua*, where he dyed *Anno 1519.*) (a) upon this subject of Jurisdictions, that *Raphael Falgofius*, that *Jaspis virtutum*, *utroque jure stupor*, as his Epitaph in *St. Anthony's-Church at Padua* (where he also dyed above one hundred years before the other) styles him, (b) when he was a young Student in the Laws, was wont to say, that of other matters and points of Law he could attain to some understanding by his private study and chamber-disquisitions, but in this point of *Jurisdictions* he could understand nothing at all but what he heard in the Schools *Vice Magistra.* (c) Of such difficulty is the subject matter of this Treatise, and yet with what confidence do some illiterate persons, (like Boys at Foot-ball)

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(a) Val. Forst.  
Hist. Jur. Ci-  
vil. l. 1. c. 40.

(b) Ibid. c. 32

(c) Jason. in ff.  
de Jurisd. l.  
On. Jul.  
R. d. m. 1.

tofs and play with *Jurisdictions*, even almost to the tripping up the heels of Magistracy it self. *Jurisdictions* are things of much tenderness as well as profoundness, and must be gently touch'd as well as deeply weigh'd; if persons in *Juridical* Authority be styled *Mortal Gods*, then *Jurisdictions* are in some sense things *Sacred*, and may not be approached unto but with *Civil* reverence; Nor is the acquisition of the profound knowledge of the Law, touching *Jurisdictions*, a pomeridian work for *sollicitous* students, much less obvious to *rural* capacities.

A right understanding what *Law* is, gives the clearest prospect to a discovery what *Jurisdictions* are; the *Civilians* do succinctly and fully define *Law*, *Lex est Sanctio Sancta*; *jubens honesta*, *prohibens contraria*. *Law* is a Decree not to be violated, commanding things honest, forbidding the contrary. *Plato* in his definition of *Law*, says, *It is a Reasonable Rule*, leading and directing men to their due end for a publick good, ordaining Penalties for them that transgress, and Reward for them that obey. *De Legibus*. And *Cicero* defines it to be the highest and chief *L. 1. De Legibus* reason grafted in nature, commanding those things which are to be done, and forbidding the contrary. And of all Laws, those of the Empire, next to the *Jus Divinum*, seem to challenge the precedency in all Forraign Kingdoms and States; though in this, as not in their proper sphere, they display not their beams with that lustre, for want of that

encouragement and employment they deserve; It is every mans duty to have the best and highest thoughts of the Laws of his own Country, yet to oppose them to the Ancient *Imperial* Laws, either as to the *Theory* thereof, with their numerous host of most Learned Interpreters, or as to the *Practick*, in the Pleadings of the highest Courts of the greatest part of the Christian World, in the many Judgments and Decisions of the several *Rotes* of *Italy* at *Rome*, at *Naples*, at *Florence*, at *Genoa*, at *Bononia*, at *Mantua*, at *Perusium*, and the rest; in the Judgments of the *Imperial* Chamber at *Spire*, which is the last result of the *German* Nation; in the Decisions of *Granado* and other places of *Spain*, and other Kingdoms; as in the Arrests of the several Courts of *Parliament* in *France*, as *Paris*, *Aux*, *Burdeaux*, *Grenoble*, and the rest; To oppose any *Municipal* Laws (save our own) to the Ancient *Imperial* Laws in the latitude aforesaid, *recitasse est refutasse*, the very recital thereof is confutation enough, saving the honour due to the Laws of our Native Country.

It will not be denied but that the *Great Legislator* of Heaven and Earth is the *Fountain* of all Laws, that is, *Law* properly so called, had its Origination from God himself. This is an undoubted *Position* not only in *Christian* Religion, but such as the *Doctors* of the *Gentiles* and *Heathens* themselves will easily admit; for even among them such  
as

L. int. Cler.  
C. de sum.  
Tria.

as assumed the Legislative Authority, & took upon them to prescribe Laws, would at the enactment thereof invoke their *false gods*, and endeavor to father them on one or other of their heathenish Deities, as *Minos*, who gave Laws to the *Cretians*, on *Jupiter*: *Numa*, who gave Laws to the *Romans*, on *Ægoria Nympha*: *Zoroaster*, who to the *Babylonians* and *Persians*, on *Horomasis*: *Trismegister*, who to the *Egyptians*, on *Mercurius*: *Charondas*, who to the *Thurians*, on *Saturn*: *Lycurgus*, who to the *Lacedemonians*, on *Apollis*: *Draco* and *Solon*, who to the *Athenians*, on *Minerva*: *Mahomet*, who to the *Arabians*, on the Angel *Gabriel*. Thus all agree in this, that *Law* hath the image and superscription of some supernatural Powers, and is more Ancient than *Adam's Fall*, as is evident by necessary though sad consequences; for without *Law* there had been no Transgression. In immediate subordination to the Divine and Natural Law written in the tables of the heart, came the *Jus Gentium*, or the *Law of Nations*, when men first began to have mutual Commerce with each other, for thereby was introduced a kind of *Necessity* for all Nations to observe some certain *Rules* as *Law*, without which no Society of men in way of reciprocal negotiations could subsist; which *Law* doth indeed flow from the *Law of Nature*; insomuch that *Cicero* was of opinion, that in all matters and affairs of the World whatever was the Consent and Concurrent ap-

Cic. Phil. 11.  
L. 1. ff. de Legib.

C. 1. Rind. l.  
18. c. 19.

Plat. in Min.

Rom. 2. 14, 15.

Tusc. 1.

Gen. 4. 17.

L. omnes pop.  
ff. de just. &  
jure.

probation or allowance of all Nations, that was to be understood the *Law of Nature*; Next unto which is the *Jus humanum & Civile*, being a distinct *Law* both from the *Law of Nature*, and also from the *Jus Gentium*, and seems to be then born into the World, when men first of many Individuals began to compact themselves into one Society, and when they first began to incorporate themselves into Bodies Politick, which in the Worlds infancy seems to be when Cain built the City of *Enoch*; for *Civil Laws* seem to have their Origination then when Cities began first to be built, Magistrates to be constituted, and Ordinations of Government to be committed to writing; for indeed *Civil Law* properly so called, is no other than that which every City constituted and enacted for it self, and for its own peculiar government; which *Law* also hath its foundation laid in the *Law of Nature*, from whence, as from a Fountain, are derived divers lesser Channels and Rivulets, according to the great variety of Places, Persons, Times and Transactions; And the *Civil Law* of the *Roman Empire*, in common acceptation and mode of speech, is now for the Antiquity, Excellency, Universality, and Authority thereof, called, *The Civil Law*, by way of Eminency, the Name and Appellation of the *Civil Law* being now properly appropriated to the *Imperial Law* and Constitutions, as that *Law* which was the *Law Currant* in all the Dominions of the *Roman*



man Empire, and is at this day in most parts of the whole Christian World. Beside these Laws peculiar to a due administration of Justice in matters meerly secular, there was also at the World's Infancy a kind of *Sacerdotal Law* or *Law* of the *Priesthood*, when men congregated first began to adore the Great God in the way of a Publick Worship; for in the first Constitution of Common-weals and Cities, it was necessary to establish certain Laws peculiar to the *Priesthood*; for it cannot be imagined, but that when men first began to offer their first-fruits and to sacrifice to God, there was then some Law in being for the worship of the *Deity*; nor ought it to be doubted but that in those days there was a *true Church* of Believers, as also *true Sacrifices*, and (as some hold) *true Sacraments*; and therefore not to be conceived but that there was also some *Ecclesiastical Law* then in force, which afterward became much more clear under *Moses Law*. And by way of additament to this, in tract of time was the *Canon Law* established in every Christian Common-wealth, which received not (as some suppose) its Original at that time when the General and Universal Councils began to be first held, as under *Constantine*, but in the days of the *Apostles* themselves, who gave divers Rules and made many *Canons* touching *Divine Worship*, and in order to the salvation of Souls. And thus *Laws* being introduced into the World, it could not be but there must be Ju-

Gen. 4.

*risdictions* also, without which the *Law* is but a dead Letter. For the clearer understanding whereof, know

That the word [*Jurisdiction*] without the Letter [*e*] etymologizeth it self. (d) For it is not so called from [*Juris*] and [*dictio*] as some would have it, but from [*Juris*] and [*ditio*]. And so *Jurisdiction* is *quasi juris potestas*. (e) But this pleaseth not *Calvin*, who in this matter following *Ferrand*, (f) would derive it from [*Juris & dictio*] and doth charge *Accursius* with an error in Judgment for holding it to be derived from [*Juris & ditio*] though he confesses that *Bartol* himself and many others do follow *Accursius* therein; whose opinion seems to have the best congruity with reason in the energy of Law, though *Ferrand's* Opinion seems to out-weigh, if the comprized matter should be ballanced only by the Letters of the Word; but indeed of the two *Accursius* hath by far the more numerous Retinue.

(d) L. potestas. De verb. Sig.

(e) L. 1. Par. hujus, ff. de Just.

(f) L. munerum. Par. judicandi, ff. de Muneribus.

(b) L. placuit. Cod. de Judiciis.

(i) L. 1. ff. de Jurisd. & Jus. in Rub. & l. 12. no. 10. ibid.

So that *Jurisdiction* taken in the large sense, as the *Genus generalissimum*, or *Plenissima Jurisdiction*, is nothing else but *Potestas* (g) *de jure Publico introducta* (h) *cum necessitate juris dicendi* (i) & *aquiritatis statuenda*. (k) The word [*Jurisdiction*], taken in this large sense, doth properly signifie, that Office or Function which the lawful Magistrate doth hold and exercise by the ordinary right of his just power and authority. [A]

Of *Jurisdictions* taken in this large sense, there are three species or kinds in the Law; There

There is *Imperium Merum*, *Imperium Mixtum*, & *Jurisdiction simplex*. And it is called *Imperium*, because it proceeds from the Authority of the Judge, and not from any right inherent or reliding in the party.

The first of these, viz. *Imperium Merum*, is that Jurisdiction, which respecting only the Publick utility is exercised *Officio Judicis Nobili*, and by way of *Accusation*.<sup>(m)</sup> This hath the power of the Sword *contra homines facinorosos*, and all Capital Offenders.<sup>(n)</sup> And is so called from its purity, simplicity and immixture with either of the other kinds of Jurisdictions.<sup>(o)</sup> Of this *Imperium Merum* Bartol makes Six several degrees,<sup>(p)</sup> which Jason contracts into Four, but Zasius into Three.

Of these Six degrees of *Imperium Merum*, the First is *Merum Imperium Maximum*; And this resides only in the Prince, or in the Supreme Authority.<sup>(q)</sup> In this Bartol doth lodge the *Legislative Faculty* or power of enacting Laws; also the calling a *General Council*, or the summoning a *Parliament*; also the power of *Confiscation* of Delinquents Goods. In a word, under this *Merum Imperium Maximum* are contained all things competent to *Princes* or the Supreme Magistrate.<sup>(r)</sup> And to these particulars which Bartol mentions under this head, the DD do add one more, and that is the creating of *Tabellions General* or *Publick Notories*.<sup>(s)</sup>

(m) Bart. in Arb. Jurisd. lit. c.

(n) Corvin. de Jurisd. & Fulgos. l. 3. de Jurisd. nu. 1.

(o) Bart. ubi supra.

(p) Bart. ib.

1.

(q) L. 1. ff. de Const. Princip.

(r) Caciulap. in L. Imperium. ff. de Jurisd. om. Jud.

(s) Jun. & alii in C. cum Pub. Tabellio, de fin. just. & Bald. in tit. de Jurisd. om. Jud.

The

2.  
(r) Bart. ubi  
supra, lit. c.  
(s) Bart. de  
Jurisd. nu. 8.

The *Second* degree is *Merum Imperium Majus*. This extends to the taking away of Life, and hath the power of the Sword. (r) Under this head also is *Quat Potestas gladii in homines facinerosos* fore-mentioned; (u) but derivitative from the Prince.

3.  
(w) Ib. nu. 9.

The *Third* degree is *Merum Imperium Magnum*, under which head is comprehended *Deportation* or perpetual banishment. (w)

(x) Jaf. in l. 7.  
ff. de Jurisd.  
nu. 24. in prin.

But these two last degrees *Jafon* comprehends under one and the same head, (x) For, says he, under the power of the Sword, *in facinerosos homines*, is comprehended three kinds of Capital Causes, viz. *First*, when the Life Natural is taken away, either in whole or in part, as by dismembration, amputation, or mutilation. (y) *Secondly*, when the Life Civil is taken away, as by loss of Liberty and by perpetual Imprisonment; for such are dead in Law. *Thirdly*, when a man is deprived of his Franchise, Freedom or Priviledges which he had in any place by a Natural or Civil Right. (z)

(y) Cyn. in l. si  
quis non di-  
cam, q. 19. C.  
de Episc. &  
Cler. & in l.  
Transigere,  
q. 4. c. de  
Transact.  
(z) Jaf. ubi sup.

4.  
(a) Bart. &  
Jaf. ibid. & l.  
nulli, C. de  
sent.

The *Fourth* degree is *Merum Imperium Parvum*, under which head is comprehended *Relegation* or temporal exilement; (a) which is no more than an extermination, whereby a man is commanded out of the confines of his own Country for a season And although *Deportatio* & *Relegatio* be often used promiscuously in the Law for one and the same, yet the Law discriminates them by very different Characters; For in *Deportation* there is a perpetual, in *Relegation* but

but a temporal banishment. And as they differ in the Circumstance of Time, so also in the Circumstance of Place; For in *Relegation* the party is only circumscribed, and it's part of his punishment that he shall not go out of the limits of such a certain place. So *Shimei* the *Benjamite*, that cursed *David* in his way to *Mahanaim*, was after *David's* death confined by his Son *Solomon* unto *Hierusalem*, and not to pass over the Brook *Kidron*; who upon occasion of his going afterwards to *Gath*, exceeded the limits of his circumscription, and for so doing was put to death by *Benajah*, at the Kings command. But now in *Deportation* the party is not so confined to or circumscribed by any certain place, but is quite banished and exiled out of all the precincts of his own Country. Again, in *Deportation* the party cannot take his Goods with him, in *Relegation* he may; but this difference holds not always. Likewise under this head is comprized every Corporal Punishment, (b) provided it be *Tortura ad poenam Delicti*; For if it be *Tortura* only *ad investigationem veritatis*, then it may be otherwise.

1 King. c. 2. v.  
8, 36, &c.

The Fifth degree is *Merum Imperium Minus*, under which is comprized that moderate Coertion by Corporal Castigations which are *ad vindictam Malefactorum*, to distinguish it from *Coertio verbalis per officium Merum*, and is competible with the Office or Function of Magistrates in Authority. (c) Also Cognizance of such crimes as are of the lesser

(b) L. Si quid  
erit, ff. de Of-  
fic. Proconsul.

5.

(c) Bart. ibid.  
& l. magistratib.  
ff. de Juris-  
dict.

(d) Bart. ib. lesser and inferiour kind. (d) Of this and the last precedent degree or member of *Imperium Merum*, Jason makes but one, (a) formerly but one of the Second and Third degrees; So that although here be Six species, degrees, or members of *Imperium Merum*, according to Bartol's account, yet here are but Four according to Jason's computation, and to him in this matter the DD do generally incline rather than unto Bartol.

The Sixth and last degree is *Merum Imperium Minimum*, which comprehends whatever is imposed by way of pecuniary mulct upon some crime, (e) provided such pecuniary mulct be in reference to the Publick Utility, and not in satisfaction of Private Injuries.

The Second Species or kind of Jurisdiction taken in this large sense, is *Imperium Mixtum*; And it is that Jurisdiction which respecting only private utility is exercised *Officio Judicis Nobili*. (f) It is so called, as being of a mixt nature, because it consists partly of *Imperium Merum*, and partly of *Jurisdiction Simplex*; And as it consists in *Commodo pecuniario*, respecting only private utility, so it doth participate of *Jurisdiction Simplex*; and is differenced from *Imperium Merum*.

Of this *Imperium Mixtum*, Bartol as in the former makes other six degrees, which Jason contracts to three, and calls them *Gradum Maximum, Medium, & Minimum*. (g) The

(e) L. in C. de modo Mulct. & l. 1. ff. si quis jus dicen. & obtemp. ff. l. 2. C. de Sportul.

*Imperium Mixtum.*

(f) Bart. ib. num. 15.

(g) In Imperium, num. 27. ff. de Jurisd. om. jud.

The *First* and *Second* of *Bartol's* degrees *Jason* doth join in one, as being both competent only to the *Prince* or *Supreme Magistrate*. The *Third* and *Fourth* of *Bartol's* degrees he likewise joyns in one, as both requiring *plenam causa cognitionem*, and both incompetent with inferior Magistrates. So likewise of the *Fifth* and *Sixth* degrees. Now because this last Division of *Jason's* seems to take best with the most part of the *DD*, as being the most succinct yet comprehensive of all, *Jason's* method shall here be followed, as formerly was *Bartol's*.

The first degree then of *Imperium Mixtum*, according to *Jason's* account, is *Imperium Mixtum Maximum*, which pertains solely to the *Prince*, and concerns only *Actus* (b) L. 2. C. de his qui veni-  
*voluntarios*; (b) yet it may be also in the ordinary Magistrate, but then it must be by way of derivation from the *Prince*. (i) This am atatis impet. (j) L. 8. ff. de Jurisd.  
*Imperium Mixtum Maximum* comprehends *veniam atatis impetranti*, (k) That is, that (k) Barr. ibid. nu. 17.  
 whereas by the Civil Law a man is held a *Minor* and under age until he attain unto the age of twenty five years, the *Prince* might at his Petition grant *veniam atatis impetranti*, that is, if such *Minor* being a Male could prove himself to be of the full age of twenty years, or being a Female could prove her self to be of the full age of eighteen years, then might such by way of Petition *impetrare veniam atatis a Principe*, that is, they might for the better management of their estate request the *Prince's* favour for  
 an

an exemption from their Minority, and to be held and taken as of full age, that is, as of the age of twenty five years, to all intents and purposes of Law whatever; only they could not by vertue of such Priviledge alienate their Prædials or Immoveables without a special Decree for that purpose; And this Priviledge was obtainable only by the Prince's Grant. (l) Also under this head is comprehended that which the Civilians call *Arrogatio*, which is a kind of *Adoption*, but something different from it; (m) For the Prince did *interponere Authoritatem Arrogationi*; (n) Likewise under this head is comprehended *Legitimation*, or the power of legitimating such as are unlawfully begotten; (o) And also *Emancipation*, which, properly so called, is a Judicial and solemn transference, alienation, or vendition of free-born children (For *Manumission* relates only to Servants and Bond-men) from and out of the *Dominium*, Power, and Jurisdiction of their natural Parents into the power and right of another, had and done by the authority of the competent Judge with the concurrency and mutual consent of both Parent and Child. By such *Emancipation* the *Patria Potestas* is dissolved, *si filius seum forisfamiliaverit*; for it is a kind of vendition or sale by a tradition or delivery of his Child out of his own right over to another, who thereby becomes at it were *Pater Fideciarius*, or a Father in trust to the Child; although anciently such *Emancipation* was held

(l) L. 1. C. de  
his qui ven.

stat. impet.

(m) Caius in

L. 2. tit. de

Adop.

(n) Ibid.

(o) Auth. qui-

bus mod. Nat.

offic. legit.

Par. libed.



held no less than Civil death to the Child, or than an *Ingressus Religionis*. (p) Likewise under this head is comprehended that which the Law calls *Supplicatio*, which is a Cognition or Retraction of a Judicial Sentence, from which lies no Appeal, by way of Supplication, pertaining only to the Prince, and in the Roman Government to the *Prætorian Præfess*. (q) This is that Remedy of a Judicial Sentence which the *Canonists* call *Revisionem Sententia*, or the Review of a Sentence. (r) This is used but very rarely and only in extraordinary Cases; but chiefly against the Sentence of such Judges as from whom by reason of their Eminency *non licet Appellare*. (s) In such Cases the imploring of the grace and favour of the Prince or Supreme Authority is properly called *Supplicatio*.

The Second degree is *Imperium Mixtum Medium*, under which is comprized a full and plenary Cognition of a Cause, with Coercion as well Real as Personal; of such is the putting a man into possession by vertue of a *Secundum Decretum*; Likewise *Restitutio in integrum*; Also the expulsion or outring another of his Actual Possession; (t) In like manner under this head are comprehended all matters that require a plenary Cognition, although it hath not Real or Personal Coercion; As to give such a possession of Goods as shall convey and carry a right of Property with it; Also to pronounce for the putting into Possession *Ex Secundo Decreto*;

(p) Flet. l. 1. c. 7. Par idem emancipat. & Cowel. Instit. jur. Angl. l. 1. c. 12. Par. 2. (q) L. 1. C. de sen. Præf. & Auth. Quæ supplicatio. C. de Præcib. imper. Off. & Bart. ubi sup. nu. 18. & in Arb. Jurisd. lit. m. (r) C. ex Literis. De Integ. Restitut. (s) L. 1. ff. de Offic. Præf. Prætor.

(t) L. ea quæ Par. Magistratib. ff. ad Municipalem.

*Decreto* ; Also to interpose ones Authority for the *Alienation* of things appertaining to *Minors* ; Also in *Transactions* of *Alimony*, and the like. (u)

(a) Bart. Fulgos, & alii ubi supra.

The *Third* and last degree is *Imperium Mixtum Minimum* ; And this consists in such things as are expedited *Officio Judicis Nobili*, but do not require a plenary Cognition as the former, but are determined by a Summary proceeding, and have respect only to *Private Utility*. Of this kind is the putting into *Possession* by a *Primum Decretum* ; Also any possession which to the Cognizance of the Cause doth not require a Proceeding *De Plano*, but only *Summarily*

(v) Fulgos, in L. Imperium. ff. de Jurisd. om. jud. nu. 40.

& *sine strepitu judicii*, (w) Of this kind also is the granting of *Possession* to *Minors* *Ex Edicto Carboniano*, so called from *Cneus Carbo* the *Prator*, and Authour of that Edict. For when upon the death of a Parent Intestate any question or Controversie arose to the Pupil or *Minor*, either Male or Female by the *Masculine* line, concerning the Inheritance or Goods of such Parent, as also concerning the State, Quality or Condition of such *Minor*, or whether he were the legitimate Child of such Parent ; In all such cases *datur Carboniano bonorum Possessio*, saith the Law ; that is, such *Minor* shall by that *Edict* be put into possession of the said Goods, he first giving good caution or security not to diminish the same during his *Minority* ; and in the mean time the dispute in Law or Controversie touching the right of Title

Title to the said Goods, as also touching the state, quality and condition of such *Minor*, is by the same Edict to be deferred and put off until he come of full age. (x) Likewise under this head falls *Manumission*, (y) or the setting at liberty such as were under the servitude and *dominium* of others, and refers properly to Servants that were under the domination of Masters, as *Emancipation* doth to children free-born, that were under the power of their natural Parents; of these kinds are *Causa Libertinitatis*, & *Causa Ingentilitatis*. (z)

(x) Casus in glos. in l. i. ff. de Carbon. Edict.

(y) Bart. in L. Imperium. ff. de Jurisd. om. jud. nu. 22.

(z) Salyc. & Rubr. l. 2. De Pedan. Judic.

The Third and last species or kind of *Jurisdiction* taken in this large sense is *Jurisdiction Simplex*; And it is that *Jurisdiction* which is exercised *Officio Judicis Mercenarii*; respecting only *Private Utility*, *Jure Actionis*. (a) And being thus exercised *Officio Judicis Mercenarii*; it differs from both the former, viz. both from *Imperium Merum*; and from *Imperium Mixtum*. Of this *Jurisdiction Simplex*, which in truth is *Jurisdiction proprie stricte & specialiter sumpta*, *Bartol* as in the former makes no less than Six Degrees; but *Jason* again as formerly reduces and contracts them to Three, viz. *Gradum Magnum*, *Medium*, *Minimum*. (b) Which method now follows, as being the acceptablest with the Modern DD. and distinctly comprehensive of all, that the Six Degrees which *Bartol* makes, are capable of.

*Jurisdiction Simplex.*

(a) Bart. ubi sup. nu. 23. Jas. ubi sup. nu. 31. Fulg. de Jurisd. om. jud. nu. 42.

(b) Jas. in L. Imperium. ff. de Jurisd. om. jud.

Under the First of these, viz. *Gradum*

F

*Jurisdiction*

*Jurisdictionis Simplicis Magnum*, are comprehended such as the Law looks on as matters of great prejudice; such are *Causa Liberales*, wherein are controverted all Disputes concerning *Liberty* or *Servitude*, *Freedom* or *Bondage*, *Ingenuity* (not of wit, but of birth) or *Libertinity*. (c) These *Causa Liberales*, are understood in the Law as certain species opposite to such things as are either of *Merum* or *Mixtum Imperium*. (d) The Actions that hence do arise are as formerly *Aktionen Liberales*, cognizable only before the Superiour Judges. (e) The truth is, such Actions as these that concern the state, quality, condition, or reputation of persons are in the Law termed *Causa Ardua*, & *Negotium Arduum*. (f) And therefore *Inferiour Judges* (who by interpretation of Law according to the *Civil Laws* account are *Judices Municipales*) (g) are no way competent to take cognizance of such Cases. (h) Likewise under this head fall all Causes, wherein upon any Action any *Castigations*, *Coertions*, *Restraints*, or other *Corporal Punishments* in execution of some *Definitive Sentence* do happen, (i) according to that smart Proverb in Law, *Qui non habet in aere, Luat in corpore*. (k) But to make it yet more clear; The Actions specially aimed at and properly intended hereby in the Law that fall under this head, are such Cases as in themselves and according to their nature are *Criminal*, but yet are *civilly* proceeded in or prosecuted,

*Quando*

(c) Rub. in ff. de Lib. Caus. & l. 42. § 1. ff. Sol. Marim. & l. 31. § 1. liberali. ff. De Receptis. qui arb. receper.

(d) L. placet. C. de Pedan. Jud.

(e) Rub. & glos. de Lib. Caus. & Fulg. in l. Imperium. ff. de Jurisd. nu. 44.

(f) Defin. Jur. nu. 18. ff. de Jurisd. & C. ex ratione. De Appell. & Jaf. som. sup. nu. 31.

(g) Fulg. ubi sup.

(h) Rub. & glos. min. ff. de Lib. Caus. & Bart. ubi sup. nu. 24.

(i) Bart. Jaf. & Fulg. ubi sup. nu. 43.

(k) L. quicumq. C. de Ser. Fug. & l. Divus. ff. de Injuris.

*Quando ex causa descendenti ex delicto, quis fuit Condemnatus Civiliter.* (l) Or such Actions *Qua Civiliter ex Maleficiis intentantur.* (m)

The Second Degree of *Jurisdictio Simplex* is *Gradus Medius*, under which are comprized all such *Pecuniary Causes* as in value exceed *Trecent' Aureos.* (n) This *Aureus* among the *Ancients* was in value about our *English Noble*, or *Six Shillings and eight pence*; but in *Justinians* time it was something more, viz. about the value of an *Angel* in our *Gold Coin.* (o) Which is something less then *Centum Cestertii*, according to the *Roman Account*, which some would have the *Aureum Antiquum* to amount unto, (p) if every *Cestertius* must be in value three half pence farthing according to our Account. (q)

The Third and last Degree of *Jurisdictio Simplex* comprehends only such small and petty summs, as will not defray the charges of a *Plenary* and *Judicial Order* of Proceeding, and therefore they are heard and determined *Summarily & velo Levato.* (r) *Barrol* would state, liquidate and ascertain these petty summs to the value of *Centum Aureos*: (s) Others to *Twenty*, others to *Ten Duckets.* (t) But *Jason* tells us plainly, that the truth and the more received opinion is, that in such cases the just and exact values are not determined or ascertained in the Law, but left *ad Arbitrium Judicis*, (u) according to that Rule in Law *in ff. de jur. delib.* (w)

(l) Defin. Jurisd. nu. 19.  
ff. de Juris.  
(m) Fulg. ubi sup. nu. 42.

(n) DD. ib.

(o) Calvin.  
ver. Aureus.

(p) Tacit. l. 17.  
de Othone.

(q) Godw.  
Rom Hist. li. 3  
Sect. 4. cap. 3.

(r) Bart. ubi sup. nu. 26.  
& Jas. ibid. nu. 32.

(s) Bart. ibid.

(t) Fulg. ubi sup. nu. 44.

(u) Jas. ib. nu. 32.

(w) L. 1. §. fin. ff. de jur. delib.

And thus although here hath been distinctly touch'd each of the *Three Species* or kinds of *Jurisdiction*, taking the word *Jurisdiction* as the *Genus generalissimum*; And although here have been given some instances for the more clear description of each *Member* or *Degree* of each *Species* thereof; yet all this would be but imperfect if such things as are or may be both of *Merum Imperium* and of *Jurisdiction Simplex* also, but in divers respects, should be omitted. Of this kind therefore is that *Tortura*, formerly hinted at; which, when it is imposed or executed, *Ad poenam*, or in *Criminal Causes*, *Ad veritatem eruendam*, is of *Merum Imperium*;

(x) Bart. in l. lute dam. Sect. qui furem, ff. de Furt.

(y) Anth. de Test. Sect. si vero ignoti, col. 7.

(z) Ang. & la. in l. Imperium, ff. de Jurisd.

(a) Panor. in cap. Cum contingat, col. 5. De Foro Competent.

(x) But when in Civil Causes it was wont to be used or imposed, because the witnesses did *vacillare*, and were inconstant, staggering or wavering in their testimony, it was then of *Jurisdiction Simplex*. (y) In like manner all moderate and light correction or punishment being inflicted *Ad poenam Levis Delicti*, is of *Merum Imperium*; but being impos'd for contempt or contumacy in Civil Actions, it is of *Jurisdiction Simplex*. (z) Also, *Excommunication*, when pronounced *Ex Publica Causa* against rebellious and contumacious persons, is of *Merum Imperium*; but being pronounced *ad instantiam partis*, it is of *Jurisdiction Simplex*. (a) So likewise *Restraint* or *Imprisonment*, when imposed by the *Canon Law ad delictum puniendum*, is of *Merum Imperium*; when otherwise imposed,

fed, it is of *Jurisdiction Simplex*. (b) Last-ly, Appeals in all Criminal Causes are of *Merum Imperium*; but in Civil Causes they are both of *Jurisdiction Simplex*, and of *Merum Imperium* also. (c)

(b) Alb. Bald. Sal Alex. & Jaf in d. et. Imperium.  
(c) D. finit J. rifid. nu. ult. ff. de Jurisd.

There are also in the Law (for these things are only hinted to the memories of such as know the Law) several other Distinctions of Jurisdiction. Such as *Jurisdiction Voluntaria & Contentiosa*. (d) But this is a Distinction in respect of the parties Litigant; the former Distinctions being in respect of the Judges themselves. There is also *Jurisdiction Ordinaria & Delegata*; which though a very common received Distinction from the *Speculator*, (e) yet in truth 'tis less true than common, and is reproved by *Bartol*, because the one differs not from the other according to the Law of Distinctions, both being in their nature one and the same, though diversified in the exercise thereof; For the Judge Delegate doth but exercise *Jurisdictionem Delegatis*. (f) There is also *Jurisdiction Prerogata*; as when the parties litigant do of themselves consent unto a Jurisdiction in one, who without such consent were no Judge in the Case; (g) but this seems more like a compromise or arbitrary decision, than like a Jurisdiction properly so called.

(d) L. 2 ff. De offic. Procons.

(e) Spec. de Jurisd. in prin.

(f) Bart. in L. Imperium. ff. De Jurisd. om. Jud. nu. 26.

(g) L. Si Con- venerit. ff. eod. & l. sed & si. ff. de Precario

There are several other Distinctions of Jurisdiction in the Law, here purposely omitted as being not so pertinent to the design in hand; This therefore that hath been

said may suffice for a hint to all such Appen-  
dixes on the Law, as sollicite rather for  
the Lawyer than the Clyent, to learn what  
a Jurisdiction in the eye of the Law is, be-  
fore they attempt the invasion thereof.

To apply the premises, and so to conclude  
this point with *Omphalius*, that famous and

(b) *Omphali*.

1. *Civil. Polit.*

cap. 105. nu.

14. & *L. Lu-*

*cio*. ff. de

*Aqu. quot. &*

*act. & Ang.*

in 12. *Sex*

*ha*. ff. de

*verb. Sig.*

(i) *Car. Tap.*

in ff. de

*Const. Prin.*

cap. 4. nu. 10.

& *Marant. Di-*

*stinct.* nu. 1.

(k) *Auth. Quæ*

*sunt Regalia.*

*Coll. 10.*

(l) *L. ff. ubi*

*sup. & l. 1. §*

*cum urbem.*

ff. de *Offic.*

*Præf. Urb. &*

*l. 1. Cod. cod.*

*tit.*

(n) *Tap. ubi*

*supra* nu. 14.

Modern German Lawyer, (b) *Jurisdiction*  
*est res indivisibilis: si tamen ejus Domini in*  
*eodem Territorio dissentiant in Exercitio Ju-*  
*risdictionis, pertinebit ad Superiorem Po-*  
*testatem, Concordia partes interponere, vel*  
*usum Jurisdictionis Exercenda dividere.* This  
seems to be the Admiralties Case in *terminis*. All Jurisdictions are essentially radi-  
cated only in the Prince or Supreme Magi-  
strate. (i) The Law ranks them *inter Re-*  
*galia Principum.* (k) The right and power  
of the conservation of Jurisdictions doth  
lodge and reside properly there, from whence  
they had their being and origination. *Ju-*  
*risdictiones omnes ab ipso Principe velut Ri-*  
*vuli a fonte suo manarunt.* (l) When the  
Prince or Supreme Authority, *Ex plenitudine*  
*Potestas*, doth create or constitute a Juris-  
diction, he doth not divest himself of the  
right of expounding his own Grant, ac-  
cording to that in the Law, (m) *Jurisdic-*  
*tio licet concedatur a Principe, semper ta-*  
*men inhaeret ejus officio.* So that when dif-  
ferences do arise concerning the Rights or  
Demands, the Ampliations or Restrictions,  
the Latitude or Boundaries of Jurisdictions,  
the Prince is the competent Judge to decide  
and



and reconcile: In this case therefore to *Caesar* is the Appeal.

CHAP. VI.

*Of Prohibitions ; Their several Kinds, Causes and Effects in the Law.*

HAVING spoken of *Jurisdictions* in general, it may not now be of less consequence to enquire, of what superseding faculty a *Prohibition* in its original and due intendment of Law may be in point of right and power for the removal of the Cognizance of Causes from one Jurisdiction to another. And although in the precedent Chapter there hath been a clear and distinct Prospect of the matter of *Jurisdictions* out of the Civil Law, being the best and indeed the only Law that could with such transparency present us with an object of that depth and difficulty, yet now being to look through other *Mediums*, so clear a sight of *Prohibitions* may not be expected to be presented in the same Glass ; For *Prohibitio* in the sense now intended, may not be taken for *Interdictum*, quod *Prætor vetat aliquid fieri* ; (a) nor be thence dissected into its several kinds and distinctions according to the Analogy of Civil Law ; This would be as little

(a) L. 1. § interdictum, & l. 2. ff. de interdict. & § Prohibitoria. Instit. cod. tit.

(b) Boer. Decif. 114. nu. 2. & ibi Faber. L. ante fin. Cod. de Off. Præf. Urb per Tex. in C. Transmissa. De Foro Compet. & Paris de Put. in Syndicat. Tit. de Excess. Baron. cap. ult. & Ang. in l. hæredi. De Usu fruct. Legat. ut voluit. Baldus in Protm. 2. lib. Decret. Colum. 2.

(c) Boer. Decif. 9. nu. 15. & Bar. & Alex. in L. omnibus. Sect. is videtur. ff. Si quis jus dic. non obtemp.

Sir Tho. Ridley's View of the Civil and Ecclesiastical Law, in part 3. cap. 1, sect. 2,

pertinent to the present purpose in hand, as rationally it could expect of credit or belief out of its proper Sphere. Suffice it therefore that it be described under such Rules and Characters as the Law of this Realm doth not disown. It shall therefore only be premised what Boerius, that famous Civilian says of it; (b) That a Judge in matters cognizable before him, may prohibit such as are within his Jurisdiction, from impleading any in another Court to his prejudice; And that an Ecclesiastical Judge may issue his Mandate to a Judge Secular, prohibiting him from meddling with matters of Ecclesiastical Cognizance. And the same Boerius, in another place, (c) says, That in such cases of Excess by the power of one Jurisdiction exercised over another, the King is to decide the Controversie.

A Prohibition in the sense most adequate to the purpose in hand, is a Writ forbidding to hold Plea in a Matter or Cause supposed to be without the Jurisdiction and Cognizance of that Court where the Suit depends; Sir Thomas Ridley calls it a *Commandment sent out of some of the Kings higher Courts of Record, where Prohibitions have been used to be granted in the Kings Name, sealed with the Seal of that Court, and subscribed with the Test of the chief Judge or Justice of the Court, from whence the Prohibition doth come, at the suggestion of the Plaintiff, pretending himself to be grieved by some Ecclesiastical or Maring Judge,*

Judge, in non-admittance of some matter, or doing some other thing against his right, in his or their Judicial Proceedings, commanding the said Ecclesiastical or Marine Judge to proceed no farther in that cause, upon pretence that the same doth not belong to the said Ecclesiastical or Marine Judge. But this description of the Writ of Prohibition, though large enough, yet not comprehensive enough; For Prohibitions may issue to Courts that have neither Ecclesiastical nor Marine Cognizance, as appears by the Learned *Fitzh.* who among Sixty several Cases by him mentioned, wherein a Prohibition doth lye, doth not instance in any against the Admiralty; Nor do the Statutes (though express as to Prohibitions against Courts Ecclesiastical speak of any in express terms or in the letter of it as against the Admiralty. Hence probably it is that the Authour of the *Terms of the Law* (d) makes no other description of a Prohibition than this, viz. That it is a Writ that lyeth where a man is impleaded in the Spiritual Court of a thing, that toucheth not Matrimony, nor Testament, nor merely Tithes; And this Writ shall be directed as well to the Party as to the Judge or his Official, to prohibit them that they proceed no farther; But if it appears afterwards to the Judges Temporal, that the matter is to be determined by the Spiritual Court, and not in the Court Temporal, then the Party shall have a Writ of Consultation, commanding the Judges of the Court Spirit-  
tual

*Fitzh.* N. B.  
verb Prohib.

(d) *Terms of Law*, verb. Prohibit.

tual to proceed in the first Plea. Which description of the Writ of Prohibition is consonant to the Statute of 2 Ed. 6. cap. 13. whereby it is provided, That he that sueth for a Prohibition, shall make a suggestion and prove it by two Witnesses; And in case it be not proved true by two Witnesses at the least in the Court where the Prohibition is granted, within six Months next after the said Prohibition; then the Party so hindered by such Prohibition, shall have a Consultation, and recover double Costs and Damages against the Party that sued for the Prohibition. And in the said description of a Prohibition by the Authour of the *Terms of Law*, there is not any thing express'd as to a Prohibition against the Admiralty, but only against Judges in matters Spiritual, wherein the Court of Admiralty is not concern'd; By the Proceedings whereof there is not (as in the other once was) the least pretence for any fear of dis-inheritance of the Crown-Rights, which will be agreed to be originally the *Causa finalis* of Prohibitions: Whence it was long since observed and published by a Learned Civilian of this Nation, (c) *That this Writ of Prohibition in those days may well be spared; For although it were some help to the Kings Inheritance and Crown, when the two Swords were*

(c) D. Cowel  
Interp. ver.  
Prohibitio.

*It may not be hence inferred, That what seems to cease of use in one respect, may not remain of use in another; As indeed this is, in Conservation not Derogation of Jurisdictions; and for prevention of Trials Coram non Iudice Competente, by an expedient of Law, whereby the Cognizance of a Cause may not be drawn from its proper Jurisdiction ad aliud Examina.*

in

in two divers hands; yet not that both Jurisdictions are settled in the King as the only Supreme Magistrate, there is little reason thereof. And indeed the Jurisdiction of the Admiralty of England was ever inherent in the Crown of England; so that there was never in that sense that parity of reason for Prohibitions against the one as against the other. That which at first hath its origination from a principle of well-grounded policy, and is of good use in one age, may afterwards be otherwise in another, specially if the Rule, *Cessante Ratione cessat Lex*, should hold in this case as in others. The Fiery Brazen Serpent when first erected, was of happy use; yet when abused by the people, *Hezekiah* brake it in pieces; (f) (f) Num. 21. 8. & 2 Kin. 18. 4. yea, though of Divine Institution, yet when it became a snare to the people, that good King did not scruple to call it *Nehushtan*. *Nehushtan*, i.e. Brass, or Brazen, or a piece of Brass. The Court of Admiralty is one of the Courts Temporal, one of the Courts of our Sovereign Lord the King, and long since owned as such, as appears by the *Resolutions* upon the Cases concerning the Jurisdiction of the Admiralty in *Anno 1632*.

In the Court of Admiralty be one of His Majesties Temporal Courts, then the old Argument of the Conservation of the Crown-Rights, seems not to hold in this case, and only for that Reason, as to Prohibitions against the Admiralty; as well for that the said Court is a Court Temporal, as that it is one of His Majesties Courts; specially

*This implies not, but that Prohibitions are still of necessary use, where Inferiour Jurisdictions meddle with matters which do not concern them, and wherein they are incompetent.*

Fitzh. N.B. fo.  
39. Cowel  
Interp. verb.  
Prohibit.

cially in Cases that are either *Locally* or *Materially* Maritime. It may not therefore be much material to inquire whether Prohibitions do lye as well against Temporal as Spiritual and Ecclesiastical Courts; For admitting a *Prohibition* according to the Learned *Fitzh.* (g) to be *A Writ for the forbidding any Court; either Spiritual or Secular, to proceed in any Cause there depending, upon suggestion that the Cognition thereof belongeth not to the said Court;* yet it is presumed that this doth not concern such Cases as *primo intuitu* appear to be *Locally* Maritime, or according to the nature thereof have been time out of mind properly of the Admiral Cognizance; For without doubt the suggestion mentioned in the said definition doth not in construction of Law pretend to any thing beyond the very truth of what is suggested; or so, as to transplea a Cause from one Jurisdiction to another, *absque minimo fumo probationis*, of the truth and reallity of the suggestion, or that the Cognition of the Cause belongeth not to the Court Prohibited. Thus having seen what a Prohibition is, which in truth is no more but this, *viz. A Charge by Writ to forbear to hold Plea either in some matter or manner, which (as is supposed or suggested) a man dealeth in beyond his Jurisdiction, or otherwise than Law will warrant;* It follows, That

Every Prohibition is either *Prohibitio Juris* by the Law it self; Or *Prohibitio hominis*,

*minis*, where the Ministry of a competent Judge is used; or *Prohibitio Facti*, of meer Fact, where it hath no sufficient ground or foundation in the Law: The Second of these, viz. the Ministry of a competent Judge is so essential, as without which neither of the other can proceed. *Prohibitio Juris* is a very Prohibition in it self, and therefore it is a contempt to sue against it. Prohibitions of Law are such as are set down by any Law or Statute of this Land, whereby Ecclesiastical Courts are interdicted from dealing in the matters in such Statutes contained. Such are the Statutes of 2 Ed. 6. cap. 13. whereby Judges Ecclesiastical are forbidden to hold Plea of any matter, cause, or thing, being contrary or repugnant to or against the effect, intent, or meaning of the Statute of Westminster 2. cap. 3. the Statutes of *Arriendi Cleri*, *Circumspectis agatis*, *Silva Cadua*, viz. 43 Ed. 3. cap. 3. The Treatise *De Regia Prohibitione*, Stat. 1 Ed. 3. cap. 10. Such also is the Statute of 9 Ed. 2. cap. 2. There are also other Statutes declaring in what Cases Prohibitions will not lye; Such are the Statutes of 9 Ed. 2. cap. 1, 4, 5. Also 18 Ed. 3. cap. 5. & 50 Ed. 3. cap. 4. Prohibitions of Fact, are such as having no solid foundation (as the other) on the Laws and Statutes of this Kingdom, may yet *pro tempore* have some kind of operation like *Prohibitio Juris*, because therein also is *Prohibitio hominis*, or the Ministry of the Judge or

Ridley's View  
of the Civil and  
Ecclesiastical  
Law; part 3.  
cap. 1. sect. 2.

or Superiour Magistrate. Such Prohibitions of Fact (where they happen) may administer more matter for Lawyers to work on, than possibly the merits of the Cause require, and have in former times occasioned several Complaints by reason of the perplexity of Law-Suits, uncertainties in matters of Jurisdiction, multiplicity of litigious Controversies, excess of Charges, delays of Proceedings, retardations of Justice, and the like. Hence it was, that Sir Tho. Ridley, in his *View of the Civil and Ecclesiastical Law*, so long since on this Subject, said, (b) *That the Right of the Supreme Magistrate is not to be supposed by Imagination, but to be made plain by Demonstration. And so both the Statute of 18 Ed. 3. cap. 5. is, whereby it is Provided, That no Prohibition shall issue, but where the King hath the Cognizance, and of right ought to have; which is very observable: And also by the fore-mentioned of 2 Ed. 6. which prohibits Prohibitions to be granted otherwise than upon sight of the Libel, and other Circumstances in the said Statute expressed. By which it is intended, the meaning of the Law-givers was not, that every idle suggestion of every Attorney should breed a Prohibition; but such only should be granted, as the Judge according to Law should think worthy thereof, if there were Right to deserve it. Where the said Sir Thomas Ridley goes on and says, That as Emulation between the two Laws in the beginning brought*

(b) *Ibid.*



brought in these multitude of Prohibitions, either against or beside Law: so the gain they brought to the Temporal Courts maintaineth them; which also (they are his words) makes the Judges that they Sess not Costs and Damages in Cases of Consultation, (although the Statute precisely requires their Assent and Assignment therein) because they would not deter other men from suing out of Prohibitions, and pursuing the same. Though this was the Observation, and those the very words of Sir Thomas Ridley upon this Subject in his time, yet we may not thence infer, that so it is also now in our time, specially now that Justice runs again in its proper channel, and her ballance equally poised; It was too true that in late years of unhappy memory the said words and observation of that *Civilian* were too sadly verified; which now no doubt will in some short time (as is already in a good degree) be completely rectified.

In order to a Prohibition there is to precede such a suggestion as may be proved, not such a suggestion as is not capable of proof; Improbable suggestions lay no foundations; Non-Entities are no Basis for Existencies; It hath been a Rule without Exception ever since the Creation, That *Ex nihilo nihil fit*. By suggesting the Place, where a Contract is supposed to be made, to be at *Burdeaux* in France in *Islington* in the County of *Middlesex*, seems to imply as if the alledging the Place, (*viz.* to be within the body of some

Though by War-  
rant from the  
Proverb,  
Losers have  
leave to speak;  
yet in case of  
Interest, such  
as cannot hold  
their own, may  
hold their peace.

*This hinders not, but that a thing really done super altum mare, (though not yet so in proof) may be surmized or suggested to be done at Land, in order only to bring it to issue, whether a Prohibition lies in the Case. This is but the Law of one Jurisdiction without any derogation of another.*

*(1) Cok. Inst. l. 3. c. 7. sect. 440. in fin.*

some County within the Realm) were essential for the entitling of that Jurisdiction, where such suggestion is made, to a Cognizance of the Cause grounded upon that suggestion, so that the Place seems to be of such Jurisdictional weight, as not capable of being translocated by the highest strength of Imagination, which may present strange things in Apparitions, but cannot possibly enervate the energy of Truths and Realities; And thence possibly it is, that for prevention of improbable surmizes, as a suggestion may be *quasi Causa sine qua non* of a Prohibition, so the said Statute of 2 Ed. 6. cap. 13. provides that probability by witness (which cannot be without verity) be a due requisite of suggestions. The Lord Coke upon this Subject of suggesting and surmizing, viz. of places beyond Sea to be as within the Body of some County within this Realm, doth acknowledge, (1) That there is variety of Opinions in the very Books of the Common Law upon this point. This kind of suggesting and surmizing did in late years of fatal memory much impede the Judicial Proceedings of the Admiralty, when it was no rare thing to meet with a suggestion of a Contract to have been made or other thing done upon the Land in some certain place within the Body of some County, that really and in truth was made or done upon or beyond the Seas, and farther possibly than the suggester ever saw in a Map. The Civilians say, there are certain Cases

Cases wherein *Prohibitio vim suam non exercet*, whereof one is, *Quando aliquid prohibetur sine Causa*; and the Law of this Realm allows another, and that is, *Quando Consultatio conceditur*.

Prohibitions in the Law there are of other kinds though not so pertinent to the purpose in hand; Such is the Writ *Indicavit*, as in matter of Tithes; (k) This lyeth also for the patron, where the Incumbent is impleaded for the Advowson or right of Patronage in a Spiritual Court; though it lyeth not till the Libel be brought to be viewed in Chancery, *Et Lis Contestata*; (l) And it lyeth only before Sentence is given in the Ecclesiastical Court, being after wards void. Lastly, a Prohibition ceaseth and loseth his vertue after a *Consultation* is granted, as appears by the Statute of 24 Ed. 1. which declares in what Cases a *Consultation* is grantable which again is afterwards more full in the Statute of 2 Ed. 6. cap. 13. whereby it is enacted, *That a Consultation shall be granted for default of proving the suggestion, and double Costs and Damages (as aforesaid) awarded to the party hindered by such Prohibition, against him that so pursued the same.* And where a *Consultation* is once truly granted, the Judge formerly prohibited, shall according to the Statute of 50 Ed. 3. cap. 4. proceed in the Cause, notwithstanding any other Prohibition thereupon, provided the matter in the Libel be not altered.

(k) Fitz. h.  
N. B. tit.  
Prohibitio.

(l) Fitzh. Ibid.

## C H A P. VII.

*Of Fictions; what a Fiction in Law is; how far and in what cases Fictions may be used according to the Rules of Law.*

BY *Fiction* is here intended no other then such as the Law it self intends, no other then such as being Authorized by Law, and introduced upon a warrant of Law, hath in operation the due effect of Law. As for other *Fictions*, the Law understands them but as meer Cyphers, tollerating none but such as are grounded upon and regulated according to the just Principles of the Law; The Essence of Law being more Rational, her Designs more Equitable, her Mediums more feasible, and her style more serious and venerable, then to hazzard either under the Conduct of any Notions inconsistent either with *Equity* or *Possibility*; For the Law doth imitate *Nature*; Such *Fictions* therefore as cannot endure the Test of Law, are Fictions indeed, proper only for a Comment upon *Lucians* Dialogues. To proceed therefore to the Law.

A *Fiction* in the eye of the Law, and such whose Practice may be warranted by Law, is *Legis adversus veritatem in re Possibili ex justa causa dispositio*. (a) So that it is *Legis*  
 (a) *Sch. d. ver. fictio.* non

*non hominis dispositio*; it must be a *Fiction* framed according to the Rules of Law, not whatever is imaginable in the conceptions of Man. This word [*Dispositio*] is sometimes taken for a *quality* of the mind, or imperfect habit, that is, an Inclination or Affection. (b) But in this place it signifies an Act proceeding from good Authority of Law; for it must be *Ex justa Causa*; which word [*just*] hath divers acceptations or significations in the Law; As sometimes it is opposed to that which is wicked or contrary to *Justice* and *Equity*; whence it follows, that the *Suggestor* may not frame or model a *Fiction* opposite thereto; Sometimes the word [*just*] is in the Law taken for *Full* or *Perfect*; And hereby all defects and imperfections for want of any Legal Requisites in the Suggestors Notions to the fabricating of a *Fiction*, are excluded; Such are the defects or imperfections in respect either of *Equity* or *Possibility*; For as the suggestions are to arise *ex justa causa*, so they are to center *in re possibili*. But to prevent mistakes, let it not be hence inferred, as if it were here implied, that all *Surmizes* and *Suggestions* at Law in order to remove or transplea a Cause from one Jurisdiction to another, were such *Fictions* as fall not within the compass of the said Definition of a *Legal Fiction*; If any such inconsequent construction be made of the Premises, or shall be made of what follows, it is no mans error but the Readers;

(b) Cas. Traet  
Dialect. 2.  
part. cap. 20,  
& 21.  
Vid. Larrea.  
Decis. granat.  
Disp. 8. nu. 58.  
Semper *Fictio*,  
licet veritati  
contraria, ta-  
men imitatur.  
§ Minorem.  
De Adopt. &  
l. Si Filius, 14.  
D. Si Cer. per.  
& l. Triennio  
18. D. de Stat.  
Liber. Et so-  
lum extendi-  
tur ad id quod  
per veritatem  
& rerum Na-  
turam fieri  
potest. Glos.  
in l. 3. D. Pro  
Socio. & Curt.  
l. 2. Conject.  
ad fratrem,  
cap. 13. & Of-  
wald. l. 14. ad  
Donel. cap. 19.  
lit. A.

For though all Fictions, whether Legal or illegal, may be Surmizes, Suggestions, or Suppositions, yet all Surmizes or Suggestions are not illegal Fictions; And many of the Suggestions used in the Practick part of the Law for the end aforesaid, are both true equitable, and possible, and consequently probable, and so of good and necessary use in practice, according to the Law in the Statute of Prohibitions in that behalf provided; And this not by way of digression, but *ad maiorem & necessariam Cautelam*, to prevent all mis-apprehensions.

The foresaid Definition of a *Fiction* Legal, not finding general entertainment among the DD, it may be free to incline with the more received opinion to *Bartols* definition thereof; whose words are (c) these, viz. *Fictio, est in re certa, ejus quod est possibile adversus veritatem, pro veritate a jure facta assumptio*. A Fiction is an Assumption of Law upon an untruth for a truth, against the truth, in some thing possible to be done, but not done. So that Surmizes and Suggestions in Judicial Practice that are true, are not (as was aforesaid) *Fictions*. In this definition it is said to be *in re certa*, to difference it from *Presumption*, which ever fixes upon something that is dubious, (d) yet carries so much of truth with it, as without better evidence is not counterpoized; But *Fictio fit super Certo*, (e) *Super Falso & Certo fingitur; Super Vero & Incerto prasumitur*. (f) Likewise, in this

(c) Bart. in l.  
Si quis pro  
Emptore. D.  
de usucapio-  
nib.

(d) L. Sive pos-  
sidentis. Cocl.  
de Probat. &  
Cyn. ibid. & l.  
non est veri-  
simile. D.  
Quod metus  
Causa.  
(e) Ind. in glof  
mag. in l. non  
est verisim.  
(f) Gothof. ad  
dub. D. de  
Probat.

this definition it is said to be *Ejus quod est possibile*, because *Super eo quod est impossibile non potest fingi.* (g) Of *Impossibilities* (g) Barr. ibid. nu. 22. there can be no Fiction according to Law whereon to ground any Suggestion. Reason it self proves this. for Art (as aforesaid) ever imitates Nature; And what is *impossible* according to Nature, is *impossible* according to Art; and though Art in some sense may be said to perfect Nature, yet it may not contradict Nature in any sense. A Fiction in Law ever imitates a possibility in Nature. (h) Again, it is said to be *Adversus veritatem*, because if it were really true, it would cease to be a Fiction, yet withal it is said to be *pro veritate*, An Assumption of Law upon an untruth for a truth, because it hath the effect of Law, being thus qualified, as fully as if it were an Assumption upon a Truth. Lastly, it is said to be *a jure facta Assumptio*, to exclude all illegal untruths, which are not of Law, but of Man, and therefore have not the designed effect in operation of Law.

(h) L. Adoptio. ff. de Adopt.

The premises considered, it is most evident, That on every Fiction according to Law, attend two such Essential Requisites, that if either of them be wanting, it ceases to be a Legal Fiction; The one is Equity, the other is Possibility; These are the *Duo Necessaria* to every Legal Fiction; And such Fictions thus qualified, are introduced by the Civil Law, wherein among many others there are speciall two that may be

said to be the Capital or more Principal Fictions in the Law; The one whereof is in *Lege Cornelia* The other in *jure Postliminii*; A Fiction *Legis Cornelia* takes place, when a Captive *intra praesidia hostium* dyes under such Captivity; For if so, then such Captive by that Law, if he made a Will before such his being taken Captive, shall in favour of such Will, and for the upholding of the same, be feigned to be dead

(i) *Le Cornelia. ff. de Testam. & l. Cornelia. ff. de Vult. substit.*

*in puncto temporis*, immediately before such his being taken Captive. (i) And so by that Legal Fiction of Death his Will is firm and valid, as if he had really dyed without ever being taken by the Enemy. That *Jure Postliminii* is, whereby for the preservation of a mans right of property, the Law doth feign him that is returned out of Captivity to be and to have been as if he had never been Captive, or at all absent from that place of his freedom and privilege, whereof he was before such his Capture; (k) whereby he is reintegrated into his primitive state and condition. As it is thus as to *Persons*, so also is it as to *Things*, such only excepted as by Law are exempted from the privilege of *Postliminium*.

(k) *L. retro. & l. in bello. § 1. & l. bona. ff. de Capt. & § 4. D. Quibus mod. just. puz. solvit.*

There are divers other Fictions in the Law, though of less weight, which have not any dependance at all on the former, yet not one of them without *Equity* and *Possibility*. Thus he that is in contempt for non-appearance in Court upon due Summons, is by Law feigned to be present, that so neither the

Law



Law might be rendred Elusory by his absence, nor himself get any advantage by his own Laches, nor the adverse party receive prejudice by the others contempt. (l) So on the other side, he that is present in Court, but doth there lurk and hide himself, *vel latitare inter culumnas*, is by the Law feigned to be absent. (m) Also he that is *in utero*, and as yet unborn, is by the Law *quoad suum commodum*, feigned to be born, lest otherwise he should be left without remedy as to a child's portion. (n) Likewise, such as enter into mutual Contracts of Partnership, though themselves may not therein create Fictions other then the Law allows, yet in matters of Society and Partnership the *Lex Aquiliana* doth feign a mutual stipulation or hypothecation in such Consortship, which the Law styles *stipulario Aquiliana*, & in such cases *Socius socio tenetur Lege Aquiliana*. (o) And in such cases of Partnership for the acquisition of a *Dominium* and Property in all the goods in Partnership without any actual delivery, the Law doth tacitly feign such a delivery, albeit it never specially intervened. (p) Likewise the Law feigns the person of one to represent the person of another, that so Nephews and Nieces may succeed together with their Unkles and Aunts in their Grandfathers and Grandmothers goods and chattels, for so much thereof as should have come to their parents respectively, in case they had been alive at the time of their said Grand-parents decease. (q) In like manner

(l) L. Absent.  
ff. de verb.  
Sign.

(m) L. ibid.  
glos. mag.

(n) L. qui in  
utero, & l.  
pen. ff. de stat  
hum.

(o) ff. Ad Leg.  
Aquil. & Rub.  
ibid. & l. Si ex  
causa. D. Pro  
Socio.

(p) L. quia  
licet ff. Pro  
Socio.

(q) L. r. § Sibi  
lus ff. de suis  
& legitimi. &  
l. 3, 4. Cod.  
he eod.

(r) § Sed si in  
b llo. Inst. de  
Excusat. Tu-  
tor.

he that is dead, may by Law be *feigned* to be alive to several constructions and operations of Law, if others his equals in age be then alive, or in case his being really alive at such time of *feigning* him to be alive, doth not exceed the natural age of man. (r) Many more instances of *Legal Fictions* might here be added, but these may suffice for proof, that though the Law allows of *Fictions*, yet never but where there is *justa causa* with equity and possibility, disowning all others as *Monstrous Fictions*, that are propagated meerly of the froth of the brain; for the Law (as aforesaid) ever resembles and imitates *Nature*; And therefore if any man will enter the lists with *Lucian*, or strain his imagination to forge rarities beyond his Dialogues, and *feign* a battle of *Elephants* to be fought on a Cobweb in the Air, or fresh water-spring to rise out of the Whales belly, or a Mine of Gold fifty fathom under ground in the middle Region of the Air, or the like, he may expect no protection from the Law for such irregular Notions.

A *Legal Fiction* under the aforesaid qualifications, is threefold; either *Inductiva*, or *Privativa*, or *Translativa & Extensiva*. A *Fiction Inductive*, is, when the Law *feigns* that to be which indeed is not; A *Fiction Privative*, is when the Law *feigns* that not to be which indeed is; And a *Fiction Translative or Extensive*, is, when the Law doth *feign* a thing to be done in one manner, which

which in truth is done in another. The first of these, or the *Inductive Fiction*, is an Assumption of Law in a thing *certain* and *possible*, upon a non-existency for an existency; The second, or the *Privative Fiction*, is alike definable, only the words inverted; And the third, or *Translative Fiction*, is only an Assumption of Law more upon the *Modus* than the *thing* it self; So called, because it is mainly conversant in one of these four varieties; As either when the Law by a *Fiction* transfers or translates some Act or Thing, either from one *place* to another, or from one *person* to another, or from one *thing* to another, or from one *time* to another; But which soever of these the *Fiction* be, it must still keep within the due limits and bounds of *equity* and *possibility*. Whatever the *Fiction* be, it may be reduced to one of these three heads, either *Inductiva*, *Privativa*; or *Translativa*; and neither of these but must *quadrare* with *Bartols* said definition, or the Law rejects it as spurious and illegitimate.

For the yet clearer apprehension of the premises, it may be no digression to insert a word by way of caution to the imperfect Notionist, that he would not hence infer as if the Law did *feign impossibilities*, because it supposes the *living* to be *dead*, and the *dead* to be *alive*; the *absent* to be *present*, and the *present* to be *absent*; and the like. For although they would indeed be *impossibilities*, if only considered simply in an identity  
of

of *fact* and *time*, of *person* and of *place*, without their right and due diversifications; yet they are not *impossibilities*, being rightly according to the Law of Fictions distinguished in respect of *fact*, *time*, *person* and *place*, together with such transactions, translocations, transtemporations, and transpersonalities, as according to Rules of Law are requisite to every Fiction that enures to any effect in Law; For that which may seem *Diceptio intellectus*, and by mis-apprehension possibly be taken for an *impossibility* in the precedent instances of a Legal Fiction, is in truth nothing but that defect or absence of verity in the person, act, thing, manner, time or place feigned; Indeed, to look for *Truth* in a *Fiction*, is to expect an *impossibility* with as much vanity as some men do for *Revelations*: if it were possible that there could be the least *verity* in the thing *supposed*, it would immediately cease to be a *Fiction*. Legal Fictions may be aptly styled, *The just Policies of Law*, to attain unto the end and effect of Law by remedies extraordinary, only where the ordinary means do fail. This therefore is no warrant to fly to *Fictions* though *Legal*, much less to others, as remedies *extraordinary*, when the *ordinary* means by Law provided may be used.

This point of *Fictions* having now been put to the touchstone of the Law, and impartially weighed in the ballance thereof, it plainly appears, what kind of Fictions they

the are, that are legally qualified to take place in the Judicial proceedings of the Civil Law in Forraign Nations, as also in this Kingdom; which (before the late unnaturall and intestine Wars) was, and now seems to be for Religion, Justice and Commerce, *Regina Insularum totius Orbis.*

## CHAP. VIII.

*That the Cognizance of all Causes and Actions arising of Contracts made, and other things done upon the Sea, is inherent in the Jurisdiction of the Admiralty.*

THIS Truth in the Law is not denyed in the Judgments of men, though it hath not wanted at least a seeming Contradiction in Practice. Witness *Susans Case* against *Turner* in *Noys Reports*; where it is said, That if a Suit be in the Court of Admiralty for a Contract supposed to be made *Super altum mare*, the Defendant upon a Surmise or Suggestion that it was made upon the Land within the Realm, may have a Prohibition. Such and the like begat that complaint of the Admiralty, which gave the Lord *Coke* occasion

*Noy Rep. M. 39  
40 Eliz. C. B.  
This may be  
but a Surmise  
in one Jurisdic-  
tion for a Sup-  
position in a-  
nother, as an ex-  
pedient whereby  
to discover un-  
to which Ju-  
risdiction the  
Case doth  
properly belong.*

(a)Coke Inst. viz. (a) That by the Laws of the Realm  
part. 4. cap. 22. the Court of Admiralty hath no cognizance,  
power, or Jurisdiction of any matter of con-  
tract, plea, or queerele within any County of  
the Realm, either upon Land or the Water :  
but every such contract, plea, or queerele, and  
all other things rising within any County, ei-  
ther upon the Land or the Water, ought to be  
tryed and determined by the Laws of the  
Land, and not before or by the Lord Admi-  
ral or his Lieutenant in any manner : So as  
it is not material, whether the place be upon  
the Water infra fluxum & refluxum aque,  
but whether it be upon any Water within any  
County. Wherefore we acknowledge that of  
contracts, pleas, and queereles made upon the  
Sea or any part thereof, which is not within  
any County (from whence no tryal can be  
had thereof by twelve men) the Lord Ad-  
miral hath and ought to have Jurisdiction.  
This was the Answer long since given to an  
Objection made by the Admiralty ; But the  
Objection was, That whereas the Cognizance  
of all Contracts and other things done upon  
the Sea, belongeth only to the Jurisdiction of the  
Admiralty, the same are made tryable at the  
Common Law, by supposing the same to have  
been done in Cheapside, and such like places.  
So that the sinew of the Objection is, That  
things done upon the Sea, being cognizable  
only in the Admiralty, are made tryable  
elsewhere by supposing them to be done in  
Cheapside, and such like places. The said  
Answer

Answer speaking nothing as to the said manner of *supposing*, seems not to enervate the said Objection; The Answer distinctly declares and sets forth where and in what places the Jurisdiction of the Admiralty hath not Cognizance, *viz.* not upon Land or Water within any County; But why (according to the said Objection) things done upon the Sea, and belonging only to the Admiralty, are made tryable at Common Law, by *supposing* them to be done in *Cheapside*, and such like places, seems yet to be resolved; *Statutum simpliciter loquens, debet intelligi de his qua vera sunt secundum veritatem, non de his qua sunt secundum Fictionem.* (b) The scruple touching the surmise implied in the supposition mentioned in the said Objection, doth arise from the fact so supposed, as whether solid enough to lay foundation for such superstructures as are built thereon. It is acknowledged, That of Contracts made and other things done upon the Sea, or any part thereof, which is not within any County, the Lord Admiral hath and ought to have Jurisdiction; but if this *Super altum mare* should by a meer surmise or suggestion be translocated in operation of Law, and so thereby become as it were *Infra Corpus Comitatus*, the said acknowledgement would seem to be disacknowledged, and the said Objection would seem to be an Objection still. *Veritatis congressus invicta est major veritas.* And he that sues an Admiral Cause in another Court,

*This is meant when the thing is so in truth and in fact, as well as supposed.*

(b) Bart. in l. Si is qui pro Emptore. D. de Usucap.

Court, ought to withdraw it, and to fine to the King. (c)

(c) In lib. Nig.  
Adm. fol. 36.

(d) Brownl.  
Rep. part. 1.  
Mich. 10 Jac.

*Brownlow Reports*, (d) That if a Bond bear date *Super alium mare*, it must be sued only in the Admiral Court. Whether then an Obligation or other Contract made on board one of the Frigats of the Navy Royal, or the like, in the *Streights*, may be tryed in other then the Admiral Court; by alledging or supposing the same to have been made in the *Streights* in *Issington* in the County of *Middlesex*, seems to be the question; for the very truth of the fact as to the place of making such Obligation in the *Streights*, or *Super alium mare*, seems not to alter the Case, if the place so suggested is not to be traversed, it being as easie and as feasible to suppose and suggest the said Frigat and the *Streights*, as *Burdeaux* in *France* to be in *Issington*. But the great Oracle of the Law assures us, (e) That things done out of the Realm may not be tryed within the Realm by the oath of twelve men.

(e) Littl. 3. c.  
7. sect. 440.

(f) H. Rep. in  
Cas. Palmer  
vers. Pope.

It is reported in *Palmer's Case* against Pope, (f) That Jennings libelled in the Admiralty against one Audley, upon a Contract said to be made apud Malaga infra districtum Maris vocat. The *Streights* of *Gibraltar* infra Jurisdictionem Maritimam; And because it appeared, That the Contract was made at the Island of Malaga, Prohibition was granted, for it was not regarded, that he added infra Jurisdictionem Maritimam, which appeared contrary. If in another Case

it



it happen to be elsewhere supposed that the Contract is made at *Burdeaux* in France in *Islington*, though by the very light of nature it appears, as soon as it is put, to be contrary, yet there may be that reason of Law to hold the place is not traversable as to the *Infra Corpus Comitatus*, which the *Infra Jurisdictionem Maritiman* cannot duly expect, when that appears to be contrary. It was once said by Justice *Wray* in *Sir Julius Casars Case*, (g) That it was hard that his Jurisdiction should be tryed before himself: It hath been observed for these last twenty years, that it is far more easie to preach good doctrine then to practise it.

(g) *Leonard*  
Rep. 30 *Eliz.*  
in *Sir Jul. Cas.*  
Case, in B.R.

The Law in all Jurisdictions is but Reason Regulated; No wonder therefore if sometimes a Cause as to the Merits of it meet with a right Decision in a wrong Jurisdiction; but less wonder if it oftener happeneth otherwise. It is reported in the Case of *Bright* against *Couper*, (h) That an Action of Covenant being brought upon a Covenant made by a Merchant with a Master of a Ship, viz. That if he would bring his Freight to such a Port, then he would pay him such a sum; it was shewed that part of the goods were taken away by *Pyrats*, and that the residue of the goods were brought to the place appointed, and there unladen; And that the Merchant had not paid, and so the Covenant broken: And the question was, whether the Merchant should pay the money agreed for, since all the

(h) *Brownl.*  
Rep. Par. 1.  
Case *Bright*  
vers. *Couper*.  
Trin. 9 *Jac.*  
Rot. 638. in  
Com. Plac.

Mer-

Merchandizes were not brought to the place appointed: And the Court was of opinion, that he ought not to pay the money, because the Agreement was not by him performed. Here is no mention made of a penny-fraight paid for the residue of the goods brought to the place appointed, albeit there was *Vis major*, or *Casus Fortuitus*, without any default in the Master or Mariners, in the Case; the Court being of opinion that he ought not to pay the money, because the Agreement was not by him performed; nor had it been performed in case of stress of weather, part of the goods had *Navis Levanda causa*, been thrown over-board; probably this Piracy, whereby came this casual incapacity of performing the Agreement, was *Super altum mare*. And the same Reporter in *Westons Case*, (1) *A Merchant hath a Ship taken by a Spaniard, being enemy, and a month after an English Merchant with a Ship called the Little Richard, re-takes it from the Spaniard; And the Owner of the Ship sueth for that in the Admiralty Court. And Prohibition was granted, because the Ship was gained by battel of an enemy. Probably this Capture and Re-capture, the occasion of this plea and querele, was only Super altum mare; and the property of Shipping called into question by reason of such supermarine accidents, the matter of this plea and querele, is of every days practice in the Admiralty, and so accustomed time out of mind. But at another time in a Case something*

(1) *Weston*  
Rep. Par. 2.  
11 *Westons Case*.  
Mich. 8 Jac.  
125. in 1 R.

something parallel to that *quod merita Cause super altum mare*, A Prohibition would not be granted, (k) *A Dunkirket having seized a French-man's Vessel, Super altum mare, sold the same with her Lading at Weymouth, whither it had been driven before its brought infra presidia Dom. Regis Hispan.* whereupon the French-man Labelled in the Court of Admiralty against the Seller pro interelle suo, who shewed that it was taken not by Letters of Mart, as was pretended, but by Piracy; And prayed a Prohibition. And it was agreed by the Justices, That if a Ship be taken by Piracy, or by Letters of Mart, and be not brought infra presidia, of that Prince by whose Subjects it was taken, that it is no lawful Prize, and the Property is not altered: and such was said to be the Law of the Court of Admiralty. And therefore the Court would not grant a Prohibition. In the former Case where Prohibition was granted, the property of the Ship seems not to be altered, for though she were, as that Case puts it, taken by an Enemy, and a Month intervened between the Capture and re-Capture, and so did *actare with Presidia per* the Captors, yet it does not appear by that Case that she was ever brought *infra presidia hostium* before such re-capture, or that ever Judication passed thereon: And if there were any alteration of Property of that Ship, the Property must have been altered *Super altum mare*, which is properly Cognizable in the Admiralty in respect of the Place as *Ball.*

How well

well as the thing it self in its own nature. Littleton, that Famous Oracle of the Law, (*Dist. 1. 3. c. 7.* as aforesaid, asserts, (*l.*) That a thing done out of the Realm may not be tryed within the Realm by the Oath of Twelve Men. The Lord Coke (as aforesaid) acknowledgeth, (*m.*) That the Lord Admiral hath and ought to have Jurisdiction of Contracts, Pleas and Querrels made upon the Sea, or any part thereof not within any County. And Sir George Crook says, (*n.*) That if a Suit be commenced in the Court of Admiralty upon things done upon the Sea, no Prohibition is to be granted. Therefore it follows, that Contracts made and other things done upon the Sea are inherent in the Jurisdiction of the Admiralty.

(*m.*) *Coke Inst.*  
*Part. 4. c. 22.*

(*n.*) *Cm. Rep. in*  
*Resol. upon*  
*the Cases of the*  
*Admiral Ju-*  
*risdiction.*  
*Hill. 8. Char.*

## CHAP. IX.

*Of Contracts and Bargains made, and other things done Beyond the Seas: And whether the Cognizance thereof doth belong to the Admiralty.*

**I**F the Jurisdiction of the Admiralty in this point should seem to be pretermitted or waved, by saying that Bargains and Contracts made beyond the Seas (wherein the

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Common Law cannot administer Justice) do belong to the Lord High Constable and Earl Marshal of *England*, it might seem tacitely to imply, as if Charter-Parties, Bills of Lading, Cockets, Invoyses, Commissions of Mart, Marine Confortships, and other Contracts or things made or done beyond Sea touching Trade and Navigation, were not within the Consuance of the Jurisdiction of the High Admiralty of *England*. Whereas it is well known, That they are only Contracts and Deeds of Arms, and of War, and the like, out of the Realm, that do properly belong to the Lord High Constable and Earl Marshal of *England*, and the like within the Realm; whose Jurisdiction is of a distinct and diversified nature, both from that of the Common Law and of the Admiralty also. It is said, (o) *That if an*

*Indenture, Bond, or other Specialty, or any* (o) *Coke Inst.*  
*Contract be made beyond Sea, for the doing* par. 4. c. 22.

*of any Act or Payment of Money within the Realm, or otherwise, wherein the Common Law can administer Justice, and give ordinary remedy: In these Cases neither the Constable and Marshal, nor the Court of Admiralty hath any Jurisdiction. So that the Admiralty seems hereby to be of little use as to Contracts though Ultra-marine.*

But the Lord *Hobard*, in *Bridgman's Case*, goes farther, and says, (p) *That it hath*  
*been often Resolved, That if any Obligation were made at Sea, yet it could not be sued in the Admiralty Court; because it is an Ob-*

(p) *Hob. Rep.*  
*in Bridgman's*  
*Case.*

ligation which takes his course, and binds according to the Common Law. So that it hence follows, that if it be made *beyond Sea*, wherein the Common Law can administer Justice, the Court of Admiralty hath not any Jurisdiction; And if it be made *at Sea*, it cannot be sued in the Admiralty Court, because it takes its course, and binds according to the Common Law. Thus betwixt Land and Water, between Contracts made *beyond Sea*, and Obligations made *at Sea*, the Admiralty seems like a kind of De-relict. But probably it is not hereby meant or intended that every Contract made beyond Sea shall be tryed at the Common Law, but only such as are there made for doing some Act within the Realm, or otherwise, wherein the Common Law can administer Justice, and give ordinary remedy; Nor every thing done *at Sea*, but only Obligations, which have their course, and bind according to the Common Law, and also when these things done *at Sea*, be not (as *Bridgman's Case* farther puts it) of the same nature and respect, that is, (as the said Case explains it) an Obligation made *at Sea* for security of a Debt growing before *at Land*, cannot be sued in the Court of Admiralty, because it is not for a Marine Cause. No man, 'tis presumed, doth question but there may be Debts growing at Land for Marine Causes, as in respect of Shipping, Navigation, and the like; Otherwise a Skipper signing Bills of Lading at Land, might pretend

tend such Bills of Lading so signed by him did not oblige him to a delivery of the Goods therein expressed according to the consignment thereof. A Marine Contract may be made, and a Nautical Debt contracted as well by Land as by Sea, for security whereof Obligation may be afterwards made at or beyond the Sea, and be within the Cognizance of the Jurisdiction of the Admiralty; which would not signify much in this or any Nation, if it could not administer Justice in any Cases save only such as have their Birth, Life and Death, their foundation, negotiation, and consummation precisely *Super altum mare*; specially where a surmise or suggestion may be material *quoad examen*, though the Case oft-times happens to prove otherwise, *quoad merita*. Sir George Croke in the foresaid Resolutions upon the Cases of Admiral Jurisdiction, (q) (q) *Croke Rep.* seems to be of another opinion, where it *Hil. 8 Char.* is said, *That if a Suit be commenced in the Court of Admiralty upon Contracts made or other things done beyond the Seas, or upon the Seas, no Prohibition to be granted or awarded.* There respect seems to be had more to the Place where the Contract is made, then whether it be for a Marine cause; There are some things that wherever they be made or done (whether this side the Sea, upon the Sea, or beyond the Sea) may be properly Cognizable in the Admiralty; Such are Charter-parties, Bills of Lading, and the like; ; There are other things wherein

the Jurisdiction of the Admiralty is limited as to the *Locality* upon or beyond the Sea; *Personal* Actions may sometimes be or not be of Admiral Cognizance, according as they are here or there *Local*, at other times they are regulated *quoad subjectam materiam*, about which they are conversant; for as there are some certain *Places* that *sui natura* are subject to the Jurisdiction of the Admiralty, so there are some certain *Things* that are likewise *sui natura*, subject to the same Jurisdiction; And as a *Maritime Place* may without respect to the *subject matter* entitle that Jurisdiction to Cognoscibility of a Case; so sometimes the *subject matter* as the said *Charter-Parties*, *Bills of Lading*, and such like, may without such absolute respect had to the *Place*, have the same operation; were it otherwise, it might be something difficult to find a Case simply and absolutely of an Admiral Cognizance; for Contracts though made even upon or beyond the Seas, are generally to take effect as *Land*; And that which is purely *Maritime* in the *Cause*, may be *Terrant* in the *Effect*; *Bills of Lading*, that are so properly inherent in the Admiralty, take effect as *Land*, though made and firm'd a Ship-board for the most part, upon or beyond the Seas; Likewise Contracts for Freight and Mariners Wages, take effect at *Land*; yet for the most part are made a Ship-board upon or beyond the Seas. These Obligations (for they are Obligations) though they are for doing



doing some Act within the Realm, as in Bills of Lading for the safe delivery ashore (the dangers of the Sea excepted) of such Goods to the Consignatory as are therein mentioned; and in Contracts of Freight and Mariners Wages for the due Payment of Money on the Land, yet are all within the Jurisdiction of the Admiralty. When a Contract is really made *Super altum mare vel ultra quatuor maria*, specially in matters *sui natura* maritime, though in order to something afterwards to be done or performed in whole or in part upon the Land; This seems by the Ancient Customs, Style and Practice of the Admiralty to be within the Jurisdiction thereof; yea, properly and exclusively, unless you hold the Doctrin of *Universal Concurren- cy*. And herein the Admiralty may safely appeal to the words of that great Oracle of the Law, whereof mention hath been made in the precedent Chapter, (r) viz. *Que chose fait hors del Royalme n' aient poest estre trie deins Le Royalme per Le serement de 12.* (r) *Littles. l. 3. c. 7. sect. 440.* A thing done out of the Realm may not be tryed within the Realm by the Oath of twelve men. This is the judgment of him whom the Lord Coke styles not only the name of a Lawyer, but of the Law it self.

No surmise or suggestion can cause that to be, which in *sui natura* is not, nor cause that legally to seem to be, which in *rerum natura* is not capable of being. The Question

is not whether an Alien born out of the Dominions of the Realm of *England* may as a Demandant bring his real Action; nor is it imagined by any, that because he is an Alien, that therefore his Case may not come to Tryal for want of a suggestion; To feign a Native of *France* to be born in such a certain place in *England*, doth not reach the Case in hand; For though it be impossible for one and the same individual person to be born in both places, yet it is not impossible but that he who is surmized or suggested to be born in one place, might in truth be born in another; nor contrary to the Rules of Law to surmize a translocation of a mans Nativity, which admits a possibility in any place within the habitable parts of the whole Universe; therefore such a surmize or suggestion may be regularly consistent with the Law of *Fictions*, and consequently practicable for the foundation of Process, Action, or Judicial Proceedings; But it may be otherwise of certain *Things*, which if you assay by a surmize to remove from their proper element, you may seem as it were to annihilate the thing itself. Or endeavouring a representation of such non-entities by a meer conception of words, you may seem as it were to attempt incapacibilities, which the Law understands not, or no other than the ebolitions of fancy; for *ex nihilo nihil fit*. Nor is it controverted whether a Delinquent for adherency with the Kings Enemies beyond Sea, shall be tryed

tried in *England*; no question but such ad-  
 herency without the Kingdom (to accom-  
 modate the matter for Tryal somewhere, and  
 to prevent a total failure of Justice) may  
 according to Law be alledged to have been  
 made in some place within the Kingdom;  
 because a Fact of that kind is within the  
 Notion of Nature and Reason capable of  
 a being in either; But it does not thence  
 follow, that the Collision of one Ship  
 against another by the violence of Wind and  
 Tide, being and capable of happening where  
*Terra firma* is not, may according to Rules  
 of Law be supposed to have happened in  
 the *Ward of Cheap*, when possibly or in  
 truth the said casualty did happen *Super al-*  
*tum mare*, it may be sixty Leagues West-  
 ward of the *Cassiterides*, or Isles of *Scilly*;  
 And this not so much to accommodate the  
 matter for a Tryal at Law somewhere for  
 prevention of a total failure of Justice, as  
 in the former cases; as to remove a Tryal,  
 already in being, from one Jurisdiction to  
 another, & *lite pendente ad aliud examen*.  
 There is a double difference and of wide  
 dimensions between the said instances and  
 the true state of the Case in hand. First,  
 that way of arguing holds well and rationally  
 to create a Tryal in case of Necessity, where  
 otherwise Justice might totally fail for want  
 of a competent Tribunal in order thereto;  
 And here there is no opponent, for the ob-  
 jection is of another nature, as when sur-  
 mizes and suggestions are used as a remedy  
 extraor-

extraordinary, where the ordinary means fail not, and that not so much to beget a Tryal which otherwise could have no being, as to remove a Tryal actually in being. Secondly, there is a vast difference in Law between *Persons* and *Things*, in reference to Legal Fictions, as to their operation in Judicial Proceedings; For *Persons* in one place will without offence to the Law admit of Fictions to suppose them in any place; but *Things* and *Actions* are ever to be accommodated as unto a possibility in Nature, so to Rationality and Equity in Act; Inasmuch that if by any manner of supposing they happen to be strain'd beyond either of these, all the Superstructure may fall for want of sufficient foundation. Though it be very true what Spiegelius once said, *Fingi Lites poterunt, ut transactio fiat citra Prætoris auctoritatem*, yet most apt and true also is that of Ulpian, (1) *Fictio privata & illicita nihil distat à fraudulenta simulatione*; The Reason in Law is, because as all Legal Fictions must ever imitate Nature it self in *re possibili*, though it be *adversus veritatem*: so it must also be *Legis ex justa causa dispositio*.

(1) L. cum hi  
§ si cum lis.  
D. de trans-  
act.

(2) Coke par. 1.  
Instit. l. 3. c. 7.  
sect. 440.

Is is said, (2) That an Obligation made beyond the Seas, may be sued in what place in England the Plaintiff please; Inasmuch that notwithstanding it bear date at Burdeaux in France, yet it may be alledged to be made in quodam loco vocat Burdeaux in France in Illington in the County of Middlesex, and there

there it shall be tryed; For, (as it is there farther added) in that case it is not traversable whether there be such a place in Irlington or no. But yet the Renowned Littleton says plainly, as is before observed, That a thing done out of the Realm

may not be tryed within the Realm by the Oath of twelve men. (u) If an Obligation made beyond the Seas, may be sued here in England, in whatsoever place the Plaintiff please, admitting the intraversability of the place, it follows, That a thing done at *Bordeaux* in France may be tryed in *Middlesex* in England, and that which was done in the *East-Indies* may be tryed in the *Ward of Cheap*. If it be admitted that the words of the incomparable Littleton, viz. [*Out of the Realm*] And

the words of the Lord Coke, viz. [*Beyond the Seas*] do according to the intendment here agree in parity of sense, though in other Cases very distinguishable, then it would seem as if there were some need of a person dexterous at Gordian knots in this point, that may not *Alexander*-like cut instead of untying the same; who withal must remember what the Lord Coke himself there says in the close of that *Bordeaux* Case in *Irlington*, viz. That these Points are necessary

(u) Litt. l. 3. c. 7. sect. 440.

Brownl. Rep. 2. Admiral Court, ibi in hæc verba.

Note, (says the Report) That it was urged by Haughton, that the intent of the Statute of 13 R. 2. cap. 5. was not to inhibit the Admiral Court, to hold Plea of any thing made beyond Sea, but only of things made within the Realm, which pertains to the Common Law, and is not in prejudice of the King or Common Law, if he hold Plea over the Sea; and that this was the intent of the Statute, appears by the Preamble.

necessary to be known in respect of the variety of opinions in our Books; whereby it is evident, that there is not that universal unanimity of consent in this point, as to render it indubitable; So that although a surmise or suggestion should translocate *Burdeaux* into *Islington*, yet 'tis not to be gain-said but that the great Oracle of the Law asserts, That *Things done without the Realm cannot be tryed within the Realm by the Oath of twelve men.* Where the Locality is meerly Circumstantial to the Fact, and not withal Essential to a Jurisdiction, in that case the intraversability of the Place need not be so considerable, as when a Right of Cognizance admits dispute by reason of such *Locality*, or the claim of another Jurisdiction not inadmissible, specially of such a Jurisdiction as mainly calculates her Cognizance according to the *Meridian* of that *Place*, where the Thing or ground of Action received its Origination, and where the very *Locality* becomes as it were one Essential to the Jurisdiction it self, and where by such an intraversability of the Place, though only surmized, it becomes not impossible but that a competent Jurisdiction may happen to be *quoad hoc* excluded.

The Jurisdiction of the Admiralty having ever been of the complaining hand touching the inconveniencies through uncertainty of Jurisdiction as to the Cognizance and Tryal of Causes Maritime, may aptly say with the Lord Coke, (*w*) *Miseria est ser-*

(w) Coke par. 4.  
Instit. c. 74.

*vitus ubi jus est vagum aut incognitum.* It hath been said (x) That if an Indenture, Bond, (x) *Coke ibid. cap. 22.* or other Specialty, or any Contract be made beyond the Sea, for the doing of any Act or Payment of any Money within the Realm, That in such Cases the Court of Admiralty hath not any Jurisdiction; And that therefore Prohibitions have been granted, as by Law they ought, when the Court of Admiralty hath dealt therewith in derogation of the Common Law. If Instances of awarding Prohibitions should amount to a general Rule without Exception, the Admiralty would seem to have made in former times many frivolous complaints; it is presumed all men will not deny, but that it is possible for a Transmarine Contract to be a Maritime Contract; if so, then possibly the Admiralty may seem to deal therewith not in derogation to the Common Law, specially if Things done without the Realm may not be tryed within the Realm by the Oath of twelve men. That no Maritime Contract shall be tryed elsewhere than in the Court of Admiralty, appears plainly by the Sea-Laws, by the Customs of the Admiralty, and by the Act made at *Hastings* by King *Edward the First.* (y) For Maritime Contracts may be made as well beyond the Seas, as at Sea; And the performance of something *ex post facto* within the Realm, in pursuance of a precedent Contract made beyond Sea, not altering the Maritime quality of the Original Fact, doth

not

(y) *Cod. Ms. de*  
*Adm. Angl.*  
*Vulgo Vo-*  
*cat. Lib. Nig.*  
*Adm. in fo. 29.*

not seem to make it cease being Maritime, nor render that incapable of continuing Maritime, which was of a Maritime Nativity.

(r) Hill.  
8 Char.

Justice Croke in the Resolution upon the Cases of Admiral Jurisdiction, subscribed 4 Febr. 1632. by all the Reverend Judges of both the Honourable Benches, Reports, (2) *That if there be a Suit commenced in the Admiralty for Fraight or Mariners Wages, or for breach of Charter-Parties, though the Charter-Party happen to be made within the Realm, so as the Penalty be not demanded, a Prohibition is not to be granted.* Much less then, if the Charter-party happen to be made without the Realm. Such Charter-Parties, as also Bills of Lading, and thelike, are Contracts frequently made beyond Sea for the delivery of goods to whom they are consigned within the Realm; if the Admiral Cognizance of such Transmarine Contracts be in derogation of the Common Law, then it should seem as if Things done out of the Realm might be tryable within the Realm by the Oath of twelve men; in variation from the precedent assertion of the Renowned Littleton. The Concessions of the said Reverend Judges in Anno 1632. seem not so much by way of enlargement as in affirmance of the Admiral Jurisdiction, for prevention of future uncertainties in point of Jurisdiction. In the Case of *Don Diego Serviento de Acuña*, Ambassador Lieger for the King of Spain, against *Jolliff and Tucker*, (a) It

(a) *Hob. Rep.*  
*Case of Don*  
*Diego Serviento de*  
*Acuña, against*  
*Jolliff and*  
*Tucker.*

was



was said, That when the Case is laid at Land, no man may by a new-found form of Suit draw it *ad aliud Examen*, but he must submit his forms to the Law, and not *à Contra*. If this be the Law, which no man questions, as being visibly founded upon good Reason, it follows, That when the Case is laid at Sea, no man should by a new-found form of Suit draw it *ad aliud examen*; For Surmizes and Suggestions or Suppositions will admit of any forms, and assume what shape you please, so may not Suits and Actions; This would seem rather to prostitute the Law to forms, than to submit the forms to the Law.

Remarkable is the Case of Palmer against Pope. (b) The Case was this; Pope agreed with Palmer, *Super altum mare*, to transport him certain Sugars; This Agreement was afterwards put in writing in the Port of Gado on the Coast of Barbary; The Sugars happened to be spoiled at Sea by Salt Water; For which Palmer sues Pope in the Admiralty; For that the Original Contract and the Breach also were both *Super altum mare*; yet upon a Suggestion that the Charter-Party was made in the Port of Gado, upon the Continent of Barbary; it was resolved, that a Prohibition lay, because the Original Contract, though it were made at Sea, yet was changed when it was put into writing Sealed, which being at Land changed the Jurisdiction as to that point. This was the Case, and this the Resolution thereupon.

(b) Hob. Rep.  
Mich. 9 Jac.  
Case Palmer  
against Pope.